

# 15-0541-cr

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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UNITED STATES OF AMERICA,

*Appellee,*

— v. —

ALLAN PETERS, AKA Hio,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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**JOINT APPENDIX**  
**Volume 3 of 3 (Pages JA-601 to JA-816)**

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Lobdell - Cross - Sacco

1    though?

2                   A    No, sir.

3                   Q    That you stashed it somewhere?

4                   A    Yes, sir.

5                   Q    And there was no issue with that, they didn't  
6   have any issue with that?

7                   A    No, sir, they didn't question me.

8                   Q    But they clearly must have known from their  
9   customer that this 200 pounds of marijuana didn't arrive?

10                  A    Yes, they did because I told them that it was  
11   too hot to go down and I would try again on Saturday and that  
12   I stashed the marijuana.

13                  Q    Now, you also testified to, well, Corey  
14   Spinner was an individual that was involved, right, you used  
15   to see Corey Spinner?

16                  A    I saw him one time.

17                  Q    One time?

18                  A    Yes, sir.

19                  Q    How much did you see Allan Forget at the dock  
20   at the canal?

21                  A    I can't remember how many times, sir.

22                  Q    A lot or?

23                  A    Yes, sir.

24                  Q    But you would -- well, from 2008-'9 time  
25   period until you were busted, you wouldn't Alain Forget --

Lobdell - Cross - Sacco

1 I'm sorry, you wouldn't see Corey Spinner very much, is that  
2 your testimony?

3 A Yes, I did not see him.

4 Q Now, these other times that you've testified  
5 that my client has paid you, when did that happen,  
6 specifically? Do you know any dates, specific dates?

7 A I don't know the specific dates on any of the  
8 others. The others stood in my mind because I knew exactly  
9 where I was that day and what had happened and all events.

10 Q And during this time period you were again  
11 using cocaine regularly, right?

12 A No, it wasn't regularly. I was using, yes, I  
13 was and it may be once or twice during the month.

14 Q And what sort of effect does cocaine have on  
15 you?

16 A On myself, it just calms my nerves down for  
17 myself.

18 Q Okay. And were you also drinking during this  
19 period of time?

20 A Yes, off and on. If I would drink, it would  
21 be on the weekend.

22 Q Now, Ms. Lobdell, is it fair to say that this  
23 was a tumultuous time in your life?

24 A My whole life, yes.

25 Q And that, at least since 2006, you have done

Lobdell - Cross - Sacco

1 things that solely serve your interests, is that fair to say?

2 A I don't know if I'd say to serve my interests.  
3 I was trying to make right choices with the wrong state of  
4 mind.

5 Q Well, what made you steal the \$5,000 from the  
6 business?

7 A I was trying to reach out for help to get out  
8 of this organization, to get away.

9 Q And then when you finally met the police in  
10 2009, did you do that?

11 A Yes, I did.

12 Q Did you get help?

13 A Yes, I did reach out to them and tell them  
14 what was going on and they agreed to help me.

15 Q And then as a result of that, you went back?

16 A Yes, I chose to go back and not say anything,  
17 due to the fact of I wanted to cooperate. I wanted to get  
18 out but I was also scared and I chose to let them believe  
19 that I didn't get busted and that I was still okay, that I  
20 did not burnt -- get burnt to run their jobs so I could set  
21 up and work with the government.

22 Q Well, isn't it true that they told you that  
23 you could work when you wanted to and that if you weren't  
24 able to work, that they would just find someone else?

25 A They had made that remark, yes.

Lobdell - Cross - Sacco

1 THE COURT: Now, again, who's they, who are we  
2 talking about?

3 Q Who told you that?

4 A Stefan had told he that before. Colin had,  
5 but, however, Roger and them when I would say no on going to  
6 a run, they were, no, you have to do this.

7 Q But at this point Roger St. Onge -- you were  
8 working mainly with Matt Forget and Colin Stewart, right,  
9 St. Onge wasn't in the picture any more?

10 A Not on the front burner, no.

11 Q So they specifically told you, don't worry  
12 about it, if you can't do it, we'll find someone else, right?

13 A Yes, sir.

14 Q And you still did it? Right?

15 A Yes, sir.

16 Q So it was not about your fear or getting  
17 sucked back into the organization, it was your choice, is  
18 that fair to say?

19 A Yes, it was my choice but the fear was in  
20 there, sir.

21 Q And now that you've demonstrated to the  
22 government that you would work with them and then against  
23 them, you have fear on the witness stand, don't you?

24 A There is a little bit, yes, I do, sir.

25 Q What could happen if you don't say what you

Lobdell - Redirect - Gardner

1 need to say, is that fair to say?

2 A Well, the only thing that I am scared about is  
3 what's going to happen when I get back on the outside, sir.

4 MR. SACCO: Your Honor, I have no further  
5 questions. Thank you.

6 MR. GARDNER: Can I have just a moment.

7 THE COURT: Yeah, go ahead, take your time.

8 (Discussion held off the record.)

9 MR. GARDNER: Your Honor, I have just a couple of  
10 questions.

11 THE COURT: Go right ahead.

12 REDIRECT EXAMINATION BY MR. GARDNER:

13 Q Ms. Lobdell, we talked on direct examination  
14 about "Alan" Forget?

15 A Yes, sir.

16 Q And you indicated that you worked with him; is  
17 that correct?

18 A Yes, sir.

19 Q How much would you see him at the defendant's  
20 residence -- or defendant's mother's property?

21 A "Alan" Forget, I'm trying to think of the  
22 exact numbers. He was there often but not all the time with  
23 them.

24 Q And you said you saw Corey Spinner one time?

25 A Yes, one time.

Lobdell - Redirect - Gardner

1 Q What was Spinner doing?

2 A I was sent to his place for him to remove  
3 tinting off a window of a truck and put a tonneau cover on  
4 top of it.

5 Q Is that that hard cover on the back of a  
6 truck?

7 A Yes, it is.

8 Q So you went to his place of business?

9 A Yes, sir.

10 Q Did you ever run into Spinner in this drug  
11 trafficking organization?

12 A No.

13 Q And we also talked on -- you spoke about on  
14 direct and cross-examination about times when the defendant  
15 paid you directly, correct?

16 A Yes.

17 Q And I know we talked about the May 2009  
18 incident where he paid you after you were caught by border  
19 patrol, is that correct?

20 A Yes, it is.

21 Q And how many other times do you think the  
22 defendant paid you directly?

23 A I think only maybe two or three.

24 Q Do you remember -- I understand you're having  
25 trouble remembering the approximate times that that happened.

Lobdell - Redirect - Gardner

1 Do you remember the locations that those transactions  
2 happened?

3 A One time was met him at his mother's house at  
4 the inlet there.

5 Q And what happened on that occasion?

6 A I just pulled up there and hand it over and  
7 that was it.

8 Q Was it at the canal?

9 A Yes.

10 Q Or was it --

11 A The canal.

12 Q Were you transporting a load that day?

13 A No.

14 Q Or did you make a special trip?

15 A Special trip.

16 Q Can you remember any other instances the  
17 locations when the defendant paid you?

18 A No, I know -- I'm trying to remember now one  
19 time and I can't -- I don't remember this one time I know  
20 when he came to the house if he brought me cigarettes and the  
21 pay or -- you know, but I remember him coming directly to my  
22 house one time but I can't remember if he brought me my pay  
23 or just the cigarettes for me.

24 MR. GARDNER: That's all the questions I have, your  
25 Honor.

Lobdell - Redirect - Gardner

1 THE COURT: Any cross on that?

2 MR. SACCO: Nothing further, Judge.

3 THE COURT: Ladies and gentlemen, I'm going to give  
4 you a quick break and we'll get you back out here, okay.  
5 Please don't talk about the case.

6 (Jury excused 3:15 p.m.)

7 THE COURT: Okay, you can step down.

8 THE WITNESS: Thank you very much.

9 (Witness excused, 3:16 p.m.)

10 THE COURT: Okay.

11 MR. GARDNER: Your Honor, I think the government is  
12 prepared to rest at this point.

13 THE COURT: Mr. Gardner, where are we going from  
14 here?

15 And we'll let you do that in front of the jury.

16 But before we bring the jury back, Mr. Sacco, have  
17 you and your client made some decisions about whether or not  
18 you're going to go forward with a case?

19 MR. SACCO: Yes, your Honor. We've talked  
20 specifically about his right to testify in his own defense,  
21 as every defendant has, and he's elected not to do that. He  
22 can confirm that with you, if you want. We also are not  
23 putting on any other proof.

24 THE COURT: You're not going to call any other  
25 witnesses?

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1 MR. SACCO: No, your Honor.

2 THE COURT: Then we're going to be prepared to wrap  
3 this case up. What I think I'm going to do, then, I'm going  
4 to let you both rest in front of the jury. I'll bring them  
5 back. Let the government rest.

6 I'll ask you in front of the jury if you and the  
7 defendant have decided whether or not you want to put a case  
8 on and we'll let you indicate that you have decided not to go  
9 forward and then I'm going to excuse this jury for the day.

10 And I'll hand you some proposed charges. We'll go  
11 through those. Your client can stay here for that, if you'd  
12 like -- that's his choice -- or we can let him go back,  
13 whatever he wants to do. But he has a right to be here, if  
14 he wants to be here for that and then I'll let you sum up in  
15 the morning.

16 MR. SACCO: As a matter of procedure, I know I have  
17 to make my Rule 29 at the close of their proof. So, as a  
18 matter of procedure, if they rest, then I rest, the Court's  
19 still going to allow me to make my Rule 29?

20 THE COURT: Actually, we can do it now, if you  
21 want. You both indicated your intention to rest. The  
22 government's going to do that. We're just going to do that  
23 formality of doing it before this jury.

24 Let's do this first, before you rest, Mr. Sacco:  
25 Mr. Peters, sir, have you discussed your right to testify

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1 with Mr. Sacco and have you made a decision, sir?

2 (Discussion held off the record.)

3 THE DEFENDANT: Yes, I did.

4 THE COURT: And, sir, what is that decision, what  
5 do you want to do?

6 THE DEFENDANT: No.

7 THE COURT: You don't want to testify, is that what  
8 you're telling me?

9 THE DEFENDANT: No, I don't want to testify.

10 THE COURT: Thank you, sir. I just wanted to get  
11 that on the record. It's important that you tell me that.

12 THE DEFENDANT: Okay.

13 THE COURT: Because that is your right that nobody  
14 can take away from you. So, I need to hear it from you,  
15 okay, and I thank you.

16 So that being done, government's indicated they're  
17 going to rest. Defense is going to rest.

18 Mr. Sacco, why don't we go ahead and let's here  
19 your motion argument now why the while the jury's out of the  
20 room.

21 MR. SACCO: Okay, thank you, Judge.

22 Pursuant to Federal Rule of Criminal Procedure 29,  
23 I'm making a motion for judgment of acquittal in that the  
24 court, of course, has heard all of the government's evidence  
25 and the evidence is not sufficient to sustain a conviction.

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1           Specifically, your Honor, the government has failed  
2 to prove my client is a member of this conspiracy and,  
3 further, that he possessed, with the intent to distribute or  
4 distributed, any marijuana in this case. I understand the  
5 proof, as it's come in, is that all these other folks around  
6 the dock or canal and other places have actively engaged in  
7 the conspiracy. But my argument, your Honor, is that my  
8 client was not a member of that conspiracy and that he  
9 himself did not distribute or attempt to distribute any  
10 marijuana.

11           Thank you.

12           THE COURT: Okay. Mr. Gardner, you want to be  
13 heard, sir?

14           MR. GARDNER: Just briefly, your Honor. The  
15 government obviously opposes this motion.

16           The government has presented quite a bit of  
17 evidence in this case but I'll focus on the three cooperating  
18 witnesses. The government believes that all three  
19 cooperating witnesses satisfy the government's proof in this  
20 case. All three witnesses provided direct evidence of, not  
21 just the conspiracy, but the defendant's participation in the  
22 conspiracy, particularly Lobdell and Forget. Looking at the  
23 evidence in the light most favorable to the government, both  
24 witnesses testified that the defendant was in control of his  
25 mother's property; that this organization was shipping

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1 marijuana through that property on a regular basis; that the  
2 defendant was present during transactions; that the defendant  
3 was being paid by the organization for use of the property;  
4 that the defendant acted as a scout for the organization and  
5 based on all that, the government believes that there's more  
6 than sufficient proof to satisfy the government's burden,  
7 your Honor.

8 THE COURT: Thank you.

9 I'm going to deny the motion. The Court is  
10 required to look at the government's proof in the light most  
11 favorable, considering the charge in question, and the Court  
12 believes there is a sufficient question of fact for this jury  
13 to decide this case. So I'm going to allow this jury to  
14 decide this case and I'm going to deny this Rule 29 motion.

15 Anything else?

16 MR. SACCO: No, your Honor. We are prepared, if  
17 they rest, we'll follow up and have our charge conference.

18 THE COURT: Then I'm going to bring this jury out  
19 here. We'll do that, go through those formalities, then I'll  
20 excuse them for the day. I will give you a copy of the  
21 proposed charge. I'll give you some time to look that over  
22 and discuss it with your client and then we'll do a charge  
23 conference.

24 And, he can, after you've reviewed the charge with  
25 him, again, he can either stay for the actual charge

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1 conference or he can head on back. It's up to him and you,  
2 okay.

3 MR. SACCO: Okay, Judge, thanks.

4 THE COURT: Bring the jury in.

5 (Jury present, 3:23 p.m.)

6 THE COURT: Okay. The record should reflect we  
7 have the ladies and gentlemen of the jury. We're back in the  
8 courtroom.

9 Mr. Gardner, is the government going to call any  
10 more witnesses?

11 MR. GARDNER: No, your Honor, the government rests.

12 THE COURT: Okay, very well. The government has  
13 rested their case.

14 Mr. Sacco, what's the defendant's pleasure with  
15 regard to going forward?

16 MR. SACCO: Your Honor, the defense also rests.

17 THE COURT: Very well. Okay.

18 Ladies and gentlemen, the proof in this case is  
19 going to be closed. All right. And the next step, if you  
20 remember from my preliminary instructions, is going to be  
21 we're going to hear closing arguments from both the  
22 government and the defense and then I'll give you a charge on  
23 the law and that's when you'll start your deliberations when  
24 those things have been completed.

25 So, here's what we're going to do. It's almost

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1 3:30 and I need to review my legal charge with these  
2 attorneys. So, what I think I'm going to do is I'm going to  
3 send you home, okay, for the day a little bit early. Ask you  
4 to be here at 9 o'clock tomorrow morning for summations and  
5 then the charge in this case and then you can start  
6 deliberating and we'll have, you know, most of the day  
7 tomorrow for you to take whatever time you need to decide  
8 this case after it's all done.

9 Now it's very important, all right, the proof is  
10 closed, all right. But this case is not over. There's two  
11 very important steps. We want to hear the closing arguments  
12 for your consideration of these attorneys and I have to  
13 instruct you on the law and how you're supposed to look at  
14 this proof and what the elements and standards are for you to  
15 make some determinations, okay. So, I don't want you coming  
16 to any conclusions yet, all right, just because the proof is  
17 closed.

18 And I certainly don't want you talking to anybody  
19 about this case. More important -- it's always important but  
20 it's very important now because there's a tendency to say,  
21 okay, we've heard all the witnesses and we're going to start  
22 making some decisions. Just wait until tomorrow morning.

23 And, again, if anybody tries to talk to you about  
24 this case, I need to know about it immediately. I don't  
25 think there's been any media coverage about this case, but if

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1 there is, please don't read or listen to anything. Put it  
2 aside or shut it off until this case is over with and then  
3 you can, you know, read it afterwards or listen to anything  
4 that you'd like.

5 Any questions about any of that?

6 (Jurors nodding no.)

7 THE COURT: Okay. Well, hopefully we'll have  
8 another sunny day tomorrow. It's supposed to be gradually  
9 warming up so it will hopefully make your morning a little  
10 easier. Have a good restful night and we will see you  
11 tomorrow morning, okay. Travel safe.

12 (Jury excused, 3:25 p.m.)

13 THE COURT: I'm going to pass out or have my  
14 courtroom deputy give you the charge but, as she's doing  
15 that, I also want to put something else on the record and  
16 we've discussed it and that's a specific charge regarding the  
17 recorded conversation between Mr. Peters and Mr. Forget and  
18 the agreement between the parties ahead of time that there's  
19 a part of that recording where Mr. Peters, the defendant in  
20 this case, indicated that he had a prior conviction for some  
21 sort of a gun violation. And the government and defense had  
22 agreed that that would be redacted out. And both parties  
23 agreed through an inadvertent error, that that portion of the  
24 recording was played and the jury heard it and, as a result  
25 of that, the defendant made a motion for a mistrial yesterday

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1 based on the government's inadvertent presentation to the  
2 jury of that portion of the recorded conversation.

3 I denied that motion on the basis that a mistrial  
4 is an extreme remedy and it was not warranted under the  
5 circumstances here.

6 Instead, I advised counsel that I would give a  
7 curative instruction either immediately or sometime  
8 thereafter with my charge to the jury that would be  
9 sufficient to eliminate any prejudice or potential prejudice  
10 to the defendant.

11 In that regard, I was going to charge this jury  
12 anyway that they were only to consider the defendant's  
13 involvement in any potential weapons activity for the limited  
14 purpose of background information and the defendant's state  
15 of mind. In addition, I was going to add that any evidence  
16 that the defendant may have been convicted of another crime  
17 may not be considered.

18 Now, in this regard, I want to add that the  
19 introduction of evidence of a prior conviction is admissible  
20 under Rule 404(b) as it may be relevant to the defendant's  
21 intent, preparation, plan, knowledge or absence of mistake  
22 and the fact that the Federal Rules of Evidence allow the  
23 admission of such evidence further belies any argument of  
24 prejudice to this defendant.

25 Nonetheless, because this was not addressed with

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1 the Court pretrial and there was an agreement between the  
2 parties, the Court does intend to instruct the jury and give  
3 them a curative instruction with regard to this inadvertent  
4 playing of the defendant admitting that he had some sort of a  
5 weapons conviction.

6 That being said, defense counsel advised the Court  
7 this morning that it was the defendant's preference to have  
8 that done as a part of the jury charge at the end of the case  
9 because it would not -- and I agree with counsel's decision  
10 on this and the defendant's decision -- that it draws less  
11 attention to this.

12 And it should be noted that the recording was  
13 played again during the testimony of Mr. Forget and that  
14 portion of it where the defendant had made the admission  
15 about some sort of weapons conviction was deleted from there.  
16 So now the jury has seen it once and seen the same recording  
17 recorded conversation again where it was not included.

18 So the last thing I want to do is draw any  
19 attention to it and I think that's the desire of defense  
20 counsel and this defendant.

21 So I'm going to include it in a section where I was  
22 going to talk about evidence of uncharged conduct, which I  
23 felt was necessary to be given in this case anyway, based on  
24 the fact that some of the proof in this case that's been  
25 offered by the government has talked about the property that

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1 they allege the defendant was controlling during the course  
2 of this conspiracy and some other criminal activity that was  
3 taking place there, that they've indicated through the  
4 testimony of cooperating witnesses that this defendant had  
5 knowledge of but are not part of this indictment.

6 And the government has offered that evidence to  
7 establish what I've previously indicated that the  
8 defendant -- establishes the defendant's intent his knowledge  
9 and absence of mistake of what was going on here with regard  
10 to this conspiracy. And, therefore, it would be admissible  
11 evidence for the jury to consider. But they can only  
12 consider it for those limited purposes and not to draw some  
13 inference about this defendant's propensity to commit crime  
14 or that it suggests that because he did something  
15 previously -- or allegedly did something previously -- that  
16 he, therefore, acted in accordance therewith in committing  
17 the crimes charged.

18 So, if you want to look to the section of the  
19 charge where we talk about uncharged conduct, I cover this  
20 and then specifically at the end of that charge and I'm just  
21 going to read the last paragraph.

22 Are you with me?

23 MR. SACCO: The last paragraph on Page 15, Judge?

24 THE COURT: Actually, the last paragraph of that  
25 section on Page 16 is where I've added the language to

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1 specifically address this issue. And, again, I'm going to  
2 address it without trying to draw too much attention to it.  
3 But I explain about the uncharged conduct and in the last  
4 paragraph how they're to consider that.

5 And then the last paragraph says, these are the  
6 sole purposes for which you may consider evidence of prior  
7 relationship between the defendant and the government's  
8 witnesses, evidence that other conduct -- of other conduct  
9 may not be considered by you for any other purpose;  
10 specifically, you may not use this evidence to conclude that  
11 because the defendant committed the acts involved in the  
12 other conduct, he must also have committed the acts charged  
13 in the indictment, nor may you consider any evidence that the  
14 defendant may have been convicted of any other crime. Any  
15 prior criminal conduct or conviction of the defendant which  
16 you may have been -- which may have been mentioned or  
17 presented through any evidence is not relevant. It may not  
18 be considered by you.

19 Once again, I stress that the defendant is not on  
20 trial for committing any acts that are not alleged in the  
21 indictment.

22 Okay. And, hopefully, I believe that will  
23 adequately cover this situation.

24 MR. SACCO: Judge, can I make a comment or request?

25 THE COURT: You may. That's why we're doing this.

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1 MR. SACCO: I don't think in this case there's any  
2 evidence of a prior conviction of my client depending on how  
3 you look at what happened here.

4 THE COURT: You mean how you interpret his  
5 statements on that recorded conversation?

6 MR. SACCO: Yeah, yeah.

7 THE COURT: Okay.

8 MR. SACCO: It's my request -- and I don't know if  
9 it's a problem or not with anyone else. I'm happy with what  
10 you've done here and I'll talk about this with my client if  
11 you take out the word conviction. I think it's covered and I  
12 don't think --

13 THE COURT: Any prior criminal conduct?

14 MR. SACCO: Just take out "or conviction". So it  
15 would read any prior criminal conduct of the defendant which  
16 may have been mentioned. Because I think that adequately  
17 covers the issue we have.

18 THE COURT: Okay.

19 MR. SACCO: And that word conviction, I'm just  
20 afraid will inflame the thoughts potentially.

21 THE COURT: Mr. Gardner, you want to be heard with  
22 regard to his request?

23 MR. GARDNER: No objection, your Honor.

24 THE COURT: Okay. Mr. Peters, just so we're clear,  
25 you made the comment in your conversation with Mr. Forget.

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1 Do you have a prior conviction for a weapons count or were  
2 you arrested, what happened, and you consult with your  
3 attorney about this. You don't have to answer my question.  
4 I just want to get this straight and make sure you're  
5 comfortable with what I'm charging this jury.

6 MR. SACCO: He does, Judge. It's an old  
7 conviction.

8 THE COURT: An old conviction, okay. But you  
9 still, despite that fact, that was clear to me, by the way  
10 you said that, I, you know, I've been -- I don't exactly know  
11 what his words were at this point but it's clear to me that  
12 he had prior conviction for weapons.

13 MR. SACCO: He basically said I already went to  
14 jail for that.

15 THE COURT: There you go.

16 MR. SACCO: So, did he go to jail and he was  
17 acquitted? It's not necessarily -- those words don't  
18 necessarily equate to a conviction and so that's why I ask  
19 that you take that word out.

20 THE COURT: And, Mr. Peters, you agree with that?

21 THE DEFENDANT: Yes.

22 THE COURT: I'm going to take conviction out and  
23 we'll just do it any prior criminal alleged criminal conduct.

24 MR. SACCO: Because I even in my defense have  
25 raised this issue of cigarette smuggling which they could

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1 conceive as, you know, criminal conduct.

2 THE COURT: Sure. Sure.

3 MR. SACCO: So.

4 THE COURT: If the jury understands that that's  
5 criminal conduct. I'm not sure that they do.

6 MR. SACCO: Yeah.

7 THE COURT: But I understand your argument. We'll  
8 take that out and then does that -- with that being granted,  
9 does that address your concern and will this curative  
10 instruction be sufficient from you and your client's view?

11 MR. SACCO: Yes, your Honor.

12 THE COURT: That's what we're going to do then.  
13 And now I'm going to step off the bench and I'm going to give  
14 you gentlemen an opportunity to take some time to review this  
15 proposed charge without me sitting here waiting and looking  
16 at you and take your time and review it.

17 And, Mr. Sacco, you can review it with your client.  
18 And, again, when I come back on the bench, if he wants to  
19 stay for the charge conference, he can or if he prefers to be  
20 taken back by the Marshals, that's his decision, okay.

21 MR. SACCO: Okay, thank you, Judge.

22 THE CLERK: Court's in recess.

23 (Recess taken.)

24 (Open court:)

25 THE COURT: We're back on the record. We're in the

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1 courtroom. The jury has been excused for the day and we're  
2 here to complete our charge conference before summations and  
3 jury charge tomorrow morning.

4 So, I find the most expeditious way is to go  
5 through the sections and you just tell me if -- I'll ask you  
6 if there's any questions or objections to each section as we  
7 go through and you can let me know if there are any issues.

8 So, starting with the introduction, role of the  
9 Court and the jury and role of the attorneys, government as a  
10 party, are there any requests or objections with regard to  
11 that initial section?

12 MR. SACCO: No, your Honor.

13 MR. GARDNER: No, sir.

14 THE COURT: And the second section, nature of  
15 evidence and it's broken down into four subsections:  
16 Testimony, exhibits, stipulations of facts -- obviously, the  
17 stipulations of fact are important in this case because there  
18 were several -- direct and circumstantial evidence;  
19 indictment is not evidence; and potential punishment not  
20 evidence.

21 Are there any requests for objections with regard  
22 to that section from government?

23 MR. GARDNER: No, sir.

24 MR. SACCO: No, your Honor.

25 THE COURT: Okay. Evaluation of evidence, which is

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1 section III. It's broken down into Sections A through L and  
2 I'll list them.

3 Verdict based on evidence, not on sympathy. B is  
4 improper considerations of race, religion, national origin,  
5 sex or age. C is quality not the quantity of the evidence.  
6 D is credibility of witnesses. E is impeachment by prior  
7 inconsistent statement. F is failure of the defendant to  
8 testify. G is accomplice testimony and there's two sections:  
9 Nature of the accomplice testimony in general and the purpose  
10 for which the testimony was introduced. H is evidence of  
11 uncharged conduct and that is the section where I'm going to  
12 add the language with the specific instruction with regard to  
13 the inadvertent playing of the recorded conversation, that  
14 section. I is use of undercover agents and informants. And  
15 J is evidence obtained through searches and wiretaps. K is  
16 transcripts of audio recordings and text messages. And L is  
17 variance of dates -- immaterial.

18 Are there any requests for objections to anything  
19 that section?

20 For the government?

21 MR. GARDNER: No, your Honor.

22 MR. SACCO: Judge, the only thing I would like to  
23 maybe clarify, Page 17 letter J. I don't think we had any  
24 wiretaps. The only reason I'm bringing that up is because  
25 that may confuse some of them. We had the recorded phone

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1 calls, but sometimes people get wrapped around the concept of  
2 wiretaps and I don't think we had an actual wiretap. So, I  
3 don't know if that's something significant or not. It says  
4 in the part that I saw that may be an issue, if defendant and  
5 others -- says something here about but what the consent and  
6 authorization of the Court, these so called wiretaps were  
7 obtained lawfully, but we didn't have any wiretaps. I don't  
8 know if we can take that out.

9 THE COURT: Mr. Gardner, you want to be heard?

10 MR. GARDNER: I have no objection to that, your  
11 Honor.

12 THE COURT: All right. So what I'm looking at --  
13 just to make sure we're talking about the same thing -- the  
14 second paragraph down from the top, in addition the  
15 government has offered evidence in the form of recordings,  
16 telephone calls and text messages between defendants and  
17 others or between the accomplice witnesses, which were  
18 obtained without the knowledge of the parties to the  
19 conversations but with the consent and authorization of the  
20 Court.

21 And then it says, these so-called wiretaps were  
22 lawfully obtained. The use of this procedure to gather  
23 evidence is perfectly lawful and the government is entitled  
24 to use such wiretaps in this case.

25 So what do we want? We want to say these

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1 recordings?

2 MR. GARDNER: We can say recordings, intercepted  
3 communications, recordings actually.

4 THE COURT: Yeah, these recordings were lawfully  
5 obtained and the use of this procedure to gather this  
6 evidence is perfectly lawful and the government is entitled  
7 to use such recordings in this case, okay.

8 MR. SACCO: Yeah, I agree.

9 MR. GARDNER: Your Honor, before we go on, may we  
10 go backwards?

11 THE COURT: Hang on a second. Let me make my notes  
12 with regard to that so we have it.

13 Mr. Sacco, does that address your concern?

14 MR. SACCO: Yes, your Honor.

15 THE COURT: Okay. Now where are we going back to?

16 MR. GARDNER: Page 5. I apologize.

17 THE COURT: All right.

18 MR. GARDNER: It's a minor thing. When the Court  
19 is discussing the stipulations of fact, will you let them  
20 know or remind the jury that we do have three stipulations of  
21 fact in this case just so they understand they have some  
22 context.

23 THE COURT: Yeah.

24 MR. SACCO: No objection, Judge.

25 THE COURT: I think -- and I'll hear you, Mr.

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1 Sacco -- I think it may be important to emphasize with these  
2 stipulations of facts that there's been no experts to testify  
3 about the fact that this was, indeed, marijuana, was tested  
4 and confirmed to be marijuana.

5 I don't want the -- I think the stipulations are  
6 pretty clear about that. I'll hear either one of you or both  
7 of you with regard to this. You want me to say anything else  
8 that, you know, that that's sufficient with regard to  
9 establish the fact that, you know, the substance in question  
10 that was being smuggled in this case was indeed marijuana?

11 MR. SACCO: Well, I would say I think it's okay to  
12 remind them about the stipulations and they can certainly  
13 read and use those.

14 The question -- I think the confusion, if we do  
15 anything else, could be there's a lot of other testimony  
16 about marijuana in this case and what's been proven in  
17 court --

18 THE COURT: Are just the stipulations.

19 MR. SACCO: Yeah.

20 THE COURT: Yeah.

21 MR. SACCO: So that's what I think.

22 THE COURT: I'll leave it alone. I'll remind them  
23 that there's three stipulations and I think it's pretty clear  
24 in there in each one of them you indicated it was tested, it  
25 was confirmed. So we'll leave it alone.

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1 MR. GARDNER: Yes.

2 THE COURT: So you're talking about right in the  
3 second paragraph?

4 MR. GARDNER: Yes, sir.

5 THE COURT: The parties entered into three distinct  
6 separate stipulations of fact.

7 MR. GARDNER: Yes, sir.

8 THE COURT: Concerning in each case the  
9 confiscation and testing of marijuana?

10 MR. GARDNER: Yes, that would be great, sir.

11 THE COURT: All right. Well, then, was there  
12 anything else in section III?

13 MR. SACCO: No, your Honor.

14 MR. GARDNER: No, sir.

15 THE COURT: Then we'll go to Section IV, which is  
16 the burden of proof. It's pretty straightforward, you know,  
17 if there's any requests or objections in that section.

18 Mr. Gardner, it's Page 18.

19 MR. GARDNER: No, your Honor.

20 MR. SACCO: No, your Honor.

21 THE COURT: Okay. We'll move on to the substantive  
22 law which starts on Page 20 and we have Count one --  
23 conspiracy to distribute or possess with intent to distribute  
24 a controlled substance. And from there we have subsections  
25 describing the elements, the first element, second element,

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1 third element and the last section is the quantity of  
2 marijuana involved.

3 Any requests or objections with regard to that  
4 section? For the government, Mr. Gardner?

5 MR. GARDNER: No, sir.

6 MR. SACCO: No, your Honor.

7 THE COURT: Last section is the conclusion.  
8 Anything about the conclusion, any requests or objections for  
9 the government?

10 MR. GARDNER: No, sir.

11 THE COURT: Mr. Sacco?

12 MR. SACCO: No, your Honor, no it's fine.

13 THE COURT: Then let's get on to the special  
14 verdict form. I think you were provided that as well, right?

15 MR. SACCO: Yes, your Honor.

16 THE COURT: It's a one-page verdict form. There's  
17 only one count here. It lists that count and it just has a  
18 blank for guilty or not guilty and then it indicates, if the  
19 answer to number one is guilty then proceed to Question 2.

20 And Question 2 has to do with quantity and it  
21 breaks out 1000 kilograms or more, 100 kilograms or more but  
22 less than 1000, and less than 100 kilograms, should they find  
23 the defendant guilty, what is he responsible for and what's  
24 been proven beyond a reasonable doubt.

25 Any issues with that for the government?

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1 MR. GARDNER: No, sir.

2 THE COURT: With this verdict form?

3 MR. SACCO: No, your Honor.

4 THE COURT: I've reviewed it with my client. He's  
5 looked at it. Right?

6 THE DEFENDANT: Yes.

7 MR. SACCO: No problem.

8 THE COURT: I think we're all set for the day.  
9 Have a good night and we'll see you first thing. We'll start  
10 with summations at 9 o'clock.

11 MR. SACCO: Yes, sir.

12 MR. GARDNER: Sounds good.

13 THE COURT: Thank you.

14 THE CLERK: Court's in recess.

15 (Proceedings recessed, 4:28 p.m.)  
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C E R T I F I C A T I O N

I, DIANE S. MARTENS, Registered Professional  
Reporter, DO HEREBY CERTIFY that I attended the foregoing  
proceedings, took stenographic notes of the same, that  
the foregoing is a true and correct copy of same and the  
whole thereof.

---

DIANE S. MARTENS, FCRR

JA-632

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA,

Plaintiff,

vs.

13-CR-316

ALLAN PETERS, aka "Hiio",

Defendant.

-----X

Transcript of *JURY TRIAL - VOLUME IV* held on  
January 30, 2014, at the James Hanley Federal Building,  
100 South Clinton Street, Syracuse, New York,  
the HONORABLE GLENN T. SUDDABY, Presiding.

A P P E A R A N C E S

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1 (Open court:)

2 THE COURT: Okay. We're in the courtroom without  
3 the jury.

4 Mr. Gardner, what are you going to do with regard  
5 to closings, are you going to go reserve some time?

6 MR. GARDNER: I'd like to reserve some time for  
7 rebuttal, your Honor.

8 THE COURT: Okay, just curious what you had in  
9 mind, that's all.

10 Is everybody ready?

11 MR. GARDNER: Yes, sir.

12 MR. SACCO: Yes, your Honor.

13 THE COURT: Please bring them in.

14 (Jury present.)

15 THE COURT: Ladies and gentlemen, good morning.

16 (Jurors say good morning.)

17 THE COURT: Hope your travel wasn't too bad. Nice  
18 and quiet out there again this morning. Sunshine, love to  
19 see it. So we're at the point where we're going to hear  
20 closing arguments and then I'm going to give you the charge  
21 on the law.

22 Mr. Gardner, sir, when you're ready.

23 MR. GARDNER: Thank you, sir.

24 Good morning, ladies and gentlemen.

25 (Jurors say good morning.)

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1           MR. GARDNER: There's an old saying in real estate,  
2 that real estate is all about location, location, location.  
3 Well, the same thing is true in international drug smuggling.  
4 It's all about location, location, location, and that's why  
5 the defendant and this property were so vital to this  
6 conspiracy and its overall success. This conspiracy would  
7 not have existed and would not have functioned so well if the  
8 defendant was not involved and helped to facilitate that.

9           So, ladies and gentlemen, the challenge for  
10 international drug smuggling organizations, the challenge for  
11 someone like Colin Stewart is he has access to hundreds and  
12 thousands of pounds of marijuana up in Canada. He has  
13 curriers in the United States that are willing to take those  
14 drugs to various locations throughout the northeast United  
15 States.

16           The problem is the border. The border is a natural  
17 choke point and it is littered with law enforcement from  
18 California to Maine and when you're transporting hundreds and  
19 thousands of pounds of marijuana, hundreds of pounds at a  
20 time, you can't go to a port-of-entry. You can't load up  
21 your truck with these giant bags of stinky, smelly marijuana  
22 and go through a port-of-entry and think that you're not  
23 going to get caught half the time or more. That's not good  
24 business and that's not the way that they work.

25           And in between the ports of entry you have border

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1 patrol patrolling all the roads, patrolling on foot,  
2 patrolling in the air and on the water. They put sensors out  
3 in between the ports of entries and cameras so if you try and  
4 sneak through the woods, you might have your picture taken;  
5 you might trip a sensor; you might run into a border patrol  
6 agent who's patrolling out there. That's risky.

7           So that's where defendant comes in. That's why  
8 that property and the defendant are so critical and vital to  
9 this organization. And the defendant and this organization  
10 took full advantage of that property and its unique location  
11 right near the border.

12           So this organization, all they had to do was  
13 transport the marijuana across that river either by boat or  
14 on snowmobile, get it to this property, load it up, put it in  
15 the currier's cars and then they're just a couple of miles  
16 from the border. But unlike pretty much every where else,  
17 they could drive this marijuana across the border without  
18 going through a port of entry without risking going through  
19 the woods, sneaking through the woods getting their picture  
20 taken or running into border patrol. They just drove it  
21 across the international border. They bypassed this massive  
22 choke point all across the United States by using this  
23 property and using its unique location on the reservation.

24           Drug trafficking organizations, drug smuggling  
25 organizations need someone like the defendant and this

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1 organization needed the defendant to make this organization  
2 work.

3 And it worked very well, ladies and gentlemen.  
4 They were incredibly successful, especially between the  
5 period of time of 2005 until 2011. I think Ms. Lobdell  
6 testified between '05 and '09 she made something between 80  
7 and a hundred runs transporting loads of marijuana. That's  
8 big money for this organization.

9 During opening statements I talked about the fact  
10 that there was three basic issues that you would have to  
11 resolve at the close of evidence in this case. Was there a  
12 conspiracy? Did the defendant knowingly participate in that  
13 conspiracy? And if he did, then there's this issue of  
14 weight, how much marijuana is he accountable for.

15 And you heard a lot of evidence from different  
16 people but, just as we talked about during opening  
17 statements, the crux of this case is those three cooperating  
18 witnesses, Lobdell, Spinner and Forget. They provided the  
19 bulk of the evidence in this case and, as we talked about in  
20 opening statements, their testimony should be looked at more  
21 critically than any of the other witnesses that you heard  
22 from because they're cooperating witnesses because they hope  
23 to gain something from their testimony. Even Mr. Forget  
24 who's been told he's not getting anything for his  
25 cooperation, he probably still hopes and wants to receive

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1 some benefit for the work that he did with DEA and for  
2 cooperating.

3 But it's a double-edged sword, ladies and  
4 gentlemen. Those cooperating witnesses have a bias, but they  
5 are also individuals that participated in this conspiracy  
6 with the defendant. So they had direct contact with the  
7 defendant and the testimony they provided is direct evidence  
8 of the defendant's involvement in this conspiracy they're  
9 like eyewitnesses. They just happen to be people who  
10 committed crimes to become eyewitnesses.

11 And what do they tell us? Well, all three  
12 individuals testified that -- aside from I think Lobdell said  
13 three loads she went to Adams Marina -- but every single load  
14 of marijuana they picked up from the defendant's mother's  
15 property. They testified that the organization would bring  
16 the marijuana down by boat, that they would unload right at  
17 that canal that they would then load it up into their  
18 vehicles and off they went. They delivered to a bunch of  
19 different locations in the United States or they would  
20 deliver it to Forget's house or this guy George King's house.

21 They talked about the frequency of their trips. I  
22 think Spinner said he made a total of 15 trips, all right,  
23 talked about how Lobdell said she made between 80 and a  
24 hundred trips and Forget, during that two-year period, he  
25 talked about moving loads at least once a week, but as much

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1 as two or three times a week. So, obviously this was a  
2 substantial organization that was moving a substantial amount  
3 of marijuana.

4 They talked about the weights involved, that they  
5 would transport no less than a hundred pounds and they would  
6 transport up to 200 and 240 pounds. And you heard from  
7 Lobdell that she would also, after she delivered the loads of  
8 marijuana, she would pick up money from the customers and  
9 then take that back to the defendant's mother's property.

10 But they also talked specifically about the  
11 defendant. You heard from Forget and Lobdell that when Colin  
12 and Stefan would come down and deliver a load of marijuana,  
13 they would meet with the defendant. They would talk about  
14 when is -- the defendant would want to know when the next  
15 load is coming through, is there anybody coming back, he  
16 would want to know about the logistics of the organization  
17 and what was happening.

18 Both Lobdell and Forget talked about how the  
19 defendant would exchange drug proceeds, that he would take  
20 drug proceeds from Colin or someone else and take it and  
21 exchange it from Canadian currency to U.S. currency so that  
22 curriers like Lobdell and Forget could be paid by the  
23 organization and defendant himself.

24 You heard Lobdell and Forget testify that Colin was  
25 paying the defendant, that Colin Stewart and Stefan was

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1 paying the defendant for use of this property. Lobdell saw  
2 that very directly. She stated that when she would bring  
3 currency back from the customers, these drug proceeds, that  
4 when they got to this landing on the defendant's mother's  
5 property, that sometimes Colin would cut that open and say  
6 here this is some cash for you, Lobdell, and this is some  
7 cash for you, Mr. Peters (indicating).

8 Forget described something similar. He said that  
9 he often saw Colin hand the defendant a paper bag or a  
10 plastic bag and say, here, this is for last week. And he  
11 also talked about that that's exactly how he got paid, that  
12 Stewart would hand him a paper bag or a plastic bag and that  
13 would contain bundles of cash.

14 Both Lobdell and Forget testified that the  
15 defendant often scouted for the organization, driving ahead  
16 of the load vehicle to make sure things were all clear, he  
17 would scout down to Route 37 just off the reservation. He  
18 would scout out further to this diner that Lobdell talked  
19 about or he would go all the way out to 87 to check that  
20 immigration checkpoint on I87. And, if there were any issues  
21 or problems, he would call back, he would let Colin know,  
22 tell them to hold up, can't go yet, Big Guy said don't go  
23 yet.

24 And what they testified about and what, when you  
25 look at the whole of their testimony, ladies and gentlemen,

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1 it shows that the defendant was in control of this property,  
2 that he didn't just have access to his mother's property but  
3 he was controlling that property and he used that property to  
4 open up this door, this gateway for the organization and that  
5 the organization was paying him to keep that gateway open.

6 But we didn't just hear from the cooperating  
7 witnesses in this case, ladies and gentlemen. We also heard  
8 a lot of evidence that corroborates what they're talking  
9 about. It's that -- it goes back to that double-edged sword.  
10 They have a bias and we need to look at their testimony  
11 critically but they also are providing direct evidence of  
12 this conspiracy.

13 And if you credit their testimony, ladies and  
14 gentlemen, if you find their testimony believable, then the  
15 government has satisfied every element in this case because  
16 they testified as to each element of this offense, that there  
17 was a conspiracy, that the defendant participated in it, and  
18 that the there was a certain amount of weight involved in the  
19 conspiracy. So, if you credit their testimony, ladies and  
20 gentlemen, the government has proven its case beyond a  
21 reasonable doubt.

22 So then the question is: Are they credible and can  
23 you believe them. And when you look at all the other  
24 evidence in this case, ladies and gentlemen, that  
25 corroborates their testimony. They did testify credibly, and

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1 I want to talk about some of that evidence. And we'll kind  
2 of start small and then I'd like to work up, work up to the  
3 bigger issues in the case.

4 First of all, ladies and gentlemen, you heard each  
5 of the witnesses testify that there was a conspiracy here  
6 and, when you listen to each of the three cooperating  
7 witnesses's testimony, they were very consistent. They all  
8 described this conspiracy in a very consistent and detailed  
9 manner. When they talked about picking up loads at the  
10 canal; when they talked about how they transported loads,  
11 what vehicles they used, all of that was very detailed and  
12 consistent.

13 But they also identified individuals in this  
14 conspiracy. They talked about Colin Stewart and Stefan  
15 Trepanier. Spinner and Forget talked about this guy X Man  
16 and Forget identified him as Xavier Daue. They talked about  
17 the runners that worked for Forget, Bill Lamaka and his  
18 neighbor Chris Searson. They talked about the defendant,  
19 obviously. So they all talked about and identified similar  
20 people in this conspiracy. And the way they described it,  
21 what Colin's role was, what the defendant's role was, what  
22 the other runners in the organization, they were very  
23 consistent and very detailed.

24 And they obviously also talked about transporting  
25 marijuana. I don't want to breeze over that because that's

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1 the most important part about this conspiracy. It is a  
2 conspiracy to distribute marijuana and you heard all of them  
3 testify that that's what they did. They transported loads of  
4 marijuana and we know that they transported loads of  
5 marijuana because two of those three cooperators got caught  
6 transporting loads of marijuana. You have the Lobdell  
7 seizure on May 8th, 2009. You have Forget's seizure on  
8 September 14th, 2010, and then Lobdell getting caught again  
9 on March 1st, 2011. So, when these witnesses testified that  
10 that's what they did, they transported marijuana, we know  
11 that's what they did. They got caught doing it.

12 They also testified about this property, the  
13 defendant's mother's property. I think Spinner testified  
14 that he thought it was just the defendant's property. I  
15 think that's how he described it. But Lobdell and Forget  
16 described it as the defendant's mother's property. And we  
17 have independent evidence that that's exactly what it was.  
18 You heard from detective Jim Sunday, the AMPS officer who  
19 came in and testified. He testified about the fact that he  
20 grew up in the Snye, that he knows the defendant, he knows  
21 Marie Peters and he knows Marie Peters lives at that  
22 residence. So when you hear the witnesses testify that  
23 that's what that property was, you have independent evidence  
24 to look at to corroborate that. And certainly that  
25 corroborates the fact that the defendant had access to that

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1 property and that he would be able to control it because it's  
2 his mother's property.

3           Each of the witnesses talked about weight in this  
4 case, which is also an important thing that I don't want to  
5 just overlook because that is a potential issue that you will  
6 have to resolve in this case. They testified about how much  
7 marijuana they were transporting. They testified that they  
8 typically would transport a hundred pound loads but it could  
9 be as much as 240 pound loads. We have independent  
10 corroboration of that.

11           Lobdell was caught initially with 250 pounds.  
12 Forget was caught with 240 pounds and Lobdell was caught with  
13 100 pounds of marijuana. So, again, you have independent  
14 corroboration of what these witnesses are telling you.

15           You heard Forget testify that when Colin would  
16 communicate with him and when Colin wanted him to pick up a  
17 load of marijuana, he would send him a text message and said  
18 supper tomorrow, lunch tomorrow, breakfast tomorrow and that  
19 meant that he had to show up at that particular time the next  
20 day at the defendant's residence.

21           You saw that after Forget was cooperating with the  
22 DEA and he was trying to get this money from Colin Stewart,  
23 this \$40,000 that he ultimately gave to the DEA, he was  
24 trying to get Corey Spinner to go pick up at the defendant's  
25 mother's property and he received a text message from Colin

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1 and that text message said lunch tomorrow, BG. That's  
2 exactly what Forget told you the process was. He would get a  
3 text just like that would tell him to go to the defendant's  
4 mother's property at a particular time and it included that  
5 abbreviation, BG, which Forget testified meant Big Guy. You  
6 heard all the witnesses testify the Big Guy is the defendant.  
7 All right.

8 Now, ladies and gentlemen, each of these witnesses  
9 described this drug smuggling organization, but what this  
10 really is, is this is a business venture. That's what this  
11 is about. It's not about drugs, it's not or it's not about  
12 the drugs themselves. It's about a business opportunity.  
13 This is an organization looking to make money. And it's big  
14 business. There's a lot of money to be made here. You heard  
15 Lobdell testify that she once transported back a million  
16 dollars on one single occasion. Forget testified that the  
17 time he swerved around and caught the law enforcement  
18 officers attention, Jacques Trepanier was sending a million  
19 dollars back to Canada through the defendant's property.  
20 This is big business.

21 And all of these individuals are in a business  
22 venture together and we heard a lot of evidence that  
23 corroborates that these individuals are in league with each  
24 other. And we heard a lot of that from this recorded  
25 conversation that took place on March 1st -- excuse me,

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1 March 25th, 2011. This is where Forget meets surreptitiously  
2 with the defendant in his van and they have this recorded  
3 conversation. I want to just take a moment and just talk  
4 about that particular piece of evidence before I get to the  
5 substance.

6 That recorded conversation is really a unique piece  
7 of evidence. So, throughout this trial you had to listen to  
8 cooperating witnesses recall events and memories and things  
9 like that and we're talking about events that occurred five,  
10 six, some even 20 years ago in Lobdell's case. That's a  
11 long, a long time that has passed. Sometimes it can be hard  
12 to remember specific details and events. But that's why that  
13 recording is so important because, one, it's not coming from  
14 a cooperating witness. It's coming from the defendant  
15 (indicating). That's his words in his own voice talking  
16 about this conspiracy. And it's at a time when the  
17 conspiracy is still on going. So it's a very reliable piece  
18 of evidence where the defendant is talking about the  
19 conspiracy as the conspiracy is happening, not five years  
20 later from a witness. So it's very helpful piece of  
21 evidence.

22 And during that conversation, you hear Forget and  
23 the defendant talking about different people. Two of the  
24 people they talk about is Colin -- the defendant first refers  
25 to him as the farmer -- but then he uses him as later on

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1 they're talking about Colin Stewart and the defendant makes  
2 reference to him and Forget says "Colin?" and the defendant  
3 says yeah. So they're talking about Colin and who's Colin?  
4 Colin Stewart, the person that all these witnesses have  
5 talked about.

6 And then later on in the conversation, the  
7 defendant brings up X and Xavier. Well, you've heard from  
8 all three of our -- excuse me, you've heard from Forget and  
9 Spinner that X Man is Xavier Daue, that's who Forget  
10 identified him as, an important member of this conspiracy,  
11 someone that would come down on the boat with these loads of  
12 marijuana. The defendant is talking about people, part of  
13 this organization, part of this business venture.

14 The defendant even references and talks about how  
15 Xavier, X Man, was just at his residence, just at his  
16 mother's residence and that he saw activity on the property.  
17 And in that recording I think one of the other interesting  
18 things about that recording is the tenor of the conversation.  
19 First of all, it's clear the defendant knows Forget. So,  
20 when Forget testifies that they've known each other for many,  
21 many years, that's pretty clear from that conversation. And  
22 the tenor of that conversation is two -- I don't know that I  
23 would say buddies -- but two people that are very familiar  
24 with each other sitting down and having a conversation.

25 And it's not always what the defendant says during

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1 that conversation that's helpful. Some of what Forget is  
2 saying is also helpful, too. Forget, during that  
3 conversation after he gets talking about his gruesome injury,  
4 he talks about working with Colin and wanting to run weed and  
5 trying to figure out how they can make money and the  
6 defendant doesn't respond by saying what are you talking  
7 about, running weed, what are you talking about? He knows  
8 what's going on. He's talking to his compatriot. He's  
9 talking to someone that he's worked with for a long time,  
10 that he knows who he is and he knows exactly who he's talking  
11 about when he's talking about Colin or X Man.

12 Then we also heard testimony from Ernie Miller from  
13 Frenchie's Chevrolet and he talked about this vehicle that  
14 the defendant put a \$5,000 cash deposit down and you also  
15 heard from Cheryl Lobdell and this transaction I think is  
16 helpful in several different ways. So you heard Cheryl  
17 testify -- Cheryl Lobdell testify that there was a meeting  
18 and one time they talked at the boat landing and the  
19 defendant was there and Cheryl and Colin and Stefan and they  
20 all talked about how Lobdell needed a new vehicle, something  
21 a little bit more reliable.

22 And the defendant volunteered, hey, I've got a  
23 vehicle all ready to go. I've got it all picked out. We  
24 know that's true. Ernie Miller testified that the defendant  
25 came in in October of 2008, put a deposit down on the vehicle

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1 and had it all picked out. Then he wanted the paperwork  
2 shredded. You also heard Lobdell testify that when she came  
3 in to get the vehicle, the defendant wanted any paperwork  
4 with his name on it shredded. Why? Somewhat obvious -- but  
5 he doesn't want that vehicle to come back to him because he  
6 knows what that vehicle is going to be used for. He knows  
7 that vehicle is going to be used to transport marijuana and  
8 if it ever gets stopped, he doesn't want it coming back to  
9 him so he wants the paperwork shredded. When Lobdell tells  
10 you -- or testified that the defendant is the one that paid  
11 for that vehicle, that's the paperwork to prove it. He did.  
12 He put down at least \$5,000 in cash for that vehicle.

13 But it also is helpful, not just to show that the  
14 defendant is buying vehicles or helping to buy vehicles for  
15 this organization but, again, it shows an association. So,  
16 when Ms. Lobdell sits up there and testifies that she's known  
17 the defendant for many years, obviously she does. The  
18 defendant's helping her buy a vehicle. But it's more than  
19 that because it's not as if they're just friends. Friends  
20 don't put \$5,000 down on a vehicle for you to drive or  
21 someone else to drive a vehicle. Business partners do. The  
22 defendant has a vested interest in the defendant -- the  
23 defendant has a vested interest in Lobdell doing her job.  
24 She needs a better vehicle so she can transport marijuana  
25 because that means everybody gets paid. If Lobdell's driving

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1 around in a vehicle that doesn't work and it breaks down and  
2 a load of marijuana gets seized, that affects this business  
3 venture, this organization and the better Lobdell can do, the  
4 better the organization does, the more money the organization  
5 is making and the more money the defendant will make, as  
6 well. He's a part of this business venture and he has a  
7 vested interest. That's why he's putting \$5,000 down on the  
8 truck.

9 So, ladies and gentlemen, you also heard all the  
10 witnesses testify that they were picking up loads at the  
11 defendant's mother's property and you have information that  
12 corroborates that, as well. You heard from detective Jim  
13 Sunday that on two occasions he observed a vehicle coming  
14 from Marie Peters' property and that vehicle ultimately was  
15 stopped with marijuana -- the one seizure in 2008, but  
16 obviously the much more important one is March 1st, 2011.

17 On March 1st, 2011, Jim Sunday sets up just outside  
18 of the Peters' residence. It's the last residence on River  
19 Road and he watches Lobdell's vehicle, the headlights coming  
20 from that property, watches it go down Cook Road and is  
21 ultimately stopped by the border patrol. What does it  
22 have in it? It has a hundred pounds of marijuana. So when  
23 Ms. Lobdell and Forget are testifying that that's where they  
24 picked up the loads of marijuana, it's clear that that's  
25 what's happening. Jim Sunday provides direct independent

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1 evidence that that is exactly what's going on.

2           And we also heard evidence about this gun pickup  
3 down in Syracuse. And the guns are not relevant when you  
4 listen to that recorded conversation between Forget and the  
5 defendant. It's clear the defendant does not condone -- does  
6 not want guns coming to his property. That's not why the  
7 government offered this evidence. It's relevant because  
8 these witnesses have testified that this property is where  
9 the organization moves everything through. Marijuana coming  
10 south, money going back up north, people going back up north.  
11 Jacques Trepanier would come down on a boat, go deliver a  
12 load and then he would be sent back up into Canada through  
13 the defendant's property. Roger St. Onge wasn't allowed to  
14 come through the United States. He couldn't go through a  
15 port-of-entry. So the organization would use his piece of  
16 property to send him down, deliver a load and then he could  
17 get back up north through this property. I'm sure you're  
18 getting sick of me saying this. It is a gateway. It is a  
19 door.

20           And then this pickup corroborates that and the  
21 defendant might not have known that these guns were coming  
22 back up, but it's clear Colin wants these guns to go through  
23 the defendant's property. He specifically references back to  
24 BG and give me an ETA for BG, BG being Big Guy that everybody  
25 has identified as the defendant. And that makes sense, that

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1 coincides with exactly what these witnesses have testified  
2 to.

3           The even more important part of that transaction is  
4 it ultimately led to Government Exhibit 13, which is that  
5 fake gun seizure report that Special Agent Hermes generated  
6 and the point of that was to get that back to Colin to show  
7 the organization that Forget didn't steal the weapons and,  
8 you know, they were seized by law enforcement, so that law  
9 enforcement could continue to use him as a confidential  
10 source.

11           So what did Forget do? Got on the phone, called  
12 the defendant and set up a meeting so that he could send that  
13 paperwork back to Colin. Again, this shows an association  
14 between the defendant and Colin. Shows this relationship,  
15 but it also shows that this is exactly how this organization  
16 works.

17           Go ahead. This is part of the recorded  
18 conversation.

19           (Audio recording played.)

20           MR. GARDNER: So, again, you have independent  
21 corroboration that when Forget tells you that I need to get  
22 something back to Colin, cell phone, whatever it is, he sends  
23 it through -- you can send it through the defendant's  
24 property. The defendant took possession of that paperwork  
25 and he took it back to Colin.

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1           You also heard testimony -- and I talked about it a  
2 little bit already -- from Lobdell and Forget that they would  
3 often see Colin or Stefan meeting with the defendant and  
4 having conversations with them about, you know, when's the  
5 next load going, basically coordinating logistics of the  
6 organization.

7           And, ladies and gentlemen, that's really the crux,  
8 the crucial part of this case is does the defendant have  
9 knowledge that this organization's moving all this marijuana  
10 through his property and is he involved in this organization.

11           And I want to listen to a couple more clips from  
12 this recorded meeting.

13           Go ahead.

14           (Audio recording played).

15           MR. GARDNER: So, ladies and gentlemen, there's a  
16 lot of information in that clip.

17           First of all, the defendant starts off by talking  
18 about Matt, who is Matt Forget, Forget's son, who Lobdell  
19 talked about and, to a lesser extent, Forget talked about.  
20 And he says Matt is moving something for somebody else,  
21 meaning Matt is moving marijuana for somebody else and he's  
22 supposed to bring that marijuana to the defendant's property  
23 and the defendant needs to tell him he's done. He's done at  
24 my mother's and that certainly implies it not just that  
25 relationship between Matt Forget and the defendant, but it

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1 also implies that Forget was bringing loads through the  
2 defendant's property and now he needs to tell him, you can't  
3 do it any more, it needs to stop.

4 And he needs it to stop because the defendant's --  
5 he's scared at this point. This is March 25th, 2011.  
6 Twenty-four days earlier Jim Sunday's sitting outside of this  
7 property that the defendant is controlling and watches a load  
8 of marijuana come out and she gets busted. And he's  
9 apparently got a friend at tribal police who's providing him  
10 sounds like very detailed information about law enforcement  
11 activity in the area. He's scared. He knows law enforcement  
12 is watching his property closely.

13 And why is he scared? Why does he care? Because  
14 he's involved in this conspiracy, because he's moving  
15 marijuana across his property. If he is not involved in this  
16 conspiracy, what does he care if law enforcement officers are  
17 watching his property? What does it matter to him? It  
18 matters because he's involved in an illegal conspiracy to  
19 transport marijuana into the U.S.

20 (Audio recording played.)

21 MR. GARDNER: Again, ladies and gentlemen, he's  
22 scared. And what he says is, I don't want even nothing going  
23 on at my mom's no more. No more, implying that there was  
24 things going on that he obviously knows about up until that  
25 point and now he wants it stopped because he's worried that

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1 law enforcement are going to catch him.

2 Moving on just a little bit, ladies and  
3 gentlemen -- and I'm getting close to the end -- you've heard  
4 testimony, also, that the defendant was getting paid by this  
5 organization and I talked about it a little bit before.  
6 Lobdell saw it directly. She saw Colin handing him cash.  
7 Forget saw something very similar just in a bag.

8 And, first of all -- I want to play a clip in a  
9 second -- but it's common sense that the defendant would be  
10 getting paid. Everybody in this organization from the bottom  
11 on up is getting paid. This is big business and even the  
12 lowly currier like Corey Spinner is getting paid a lot. He's  
13 getting paid a thousand dollars to transport a load of  
14 marijuana from the defendant's mother's property to Forget's  
15 house and then he gets another thousand dollars to drive out  
16 to I87. It's \$2,000 for a few hours of work, five, six hours  
17 of work. That's huge money and Corey Spinner is at the  
18 bottom of this organization. Everybody in this organization  
19 is getting paid, including the defendant. That's common  
20 sense. That's how good businesses work. And this is a good  
21 business. This is well run. This isn't some ad hoc, you  
22 know, guy who comes upon a load of marijuana and just needs  
23 to get it into the United States one time. This is a  
24 well-run, well-functioning business. And a good business  
25 isn't going to take the chance that their primary gateway

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1 into the United States, the lynchpin to their entire  
2 organization isn't on board.

3           What I mean by that, ladies and gentlemen, is that,  
4 of course, the defendant knows what's going on and, of  
5 course, they're paying him because they're not going to --  
6 this organization isn't going to leave this to chance. We're  
7 talking about millions of dollars and they're not just  
8 going -- they're not going to just hope that their primary --  
9 their only way -- into the United States is going to be  
10 closed. They have schedules. They have customers waiting  
11 for product. They have to be able to move back and forth  
12 routinely and the best way to insure that is to pay the door  
13 man and make sure the door is always open. The door man,  
14 obviously is the defendant.

15           Oh. I don't have a clip but also the defendant  
16 says it better, better than I could, and he's actually  
17 talking about cigarettes at the time. But in the recording  
18 he says it better than I can, he says, I'm not doing nothing  
19 for free. Nobody does anything for free. The defendant's  
20 involved. He's getting paid and that's really just common  
21 sense.

22           (Audio recording played.)

23           MR. GARDNER: The defendant says quite a bit there.  
24 But he wants to block off this canal because people are  
25 sneaking in and they're dropping off loads and using his

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1 property and he's upset about this but he's not upset because  
2 he has some kind of moral opposition to smuggling. He's  
3 upset because he's not getting paid. He's upset because  
4 people are using this property without his permission. He's  
5 the one controlling and in charge of this property and if  
6 you're going to use that property, you better be going  
7 through him or he's going to sink logs or whatever into the  
8 canal and he's going to set up booby traps so that if you  
9 try and come in and use his property without permission,  
10 you're going to have problems.

11 And just like Forget says in the middle of that  
12 conversation, he says, you don't want people sneaking through  
13 the property, you want them going through you -- I'm  
14 paraphrasing a little bit -- and then the defendant quotes  
15 his mom -- I think this is apropos -- his mom says, if  
16 they're not getting paid, nobody should be using the  
17 property. That's exactly what the defendant thinks.

18 But Colin and Stefan do pay. They're good business  
19 men. They're paying the defendant to keep that doorway open.  
20 All those other people -- I'm sure there are people using his  
21 property that he doesn't want but it's not Colin and Stefan.  
22 They pay. They've been good business partners over the  
23 years.

24 All right. So, ladies and gentlemen, if you find  
25 that the defendant knowingly participated in this conspiracy,

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1 you'll also have to address this issue of weight. How much  
2 marijuana is the defendant accountable for? And, as the  
3 judge is going to instruct you, it's what is reasonably  
4 foreseeable to the defendant. So it doesn't mean how many  
5 times did the defendant pick up a bag of marijuana and move  
6 it. All it means is if it was reasonably foreseeable, the  
7 defendant understood this conspiracy involved X amount of  
8 weight, then the defendant is accountable for that.

9 And the government has charged the defendant and  
10 charged this conspiracy as involving more than a thousand  
11 kilograms. We've spoken in this case mostly about pounds so  
12 it's a little confusing. A kilogram is 2.2 pounds. So, a  
13 thousand kilograms is 2,200 pounds. And most of the  
14 witnesses when they spoke, they spoke about pounds instead of  
15 kilograms. So I know that's a little confusing. But I  
16 wanted to break this down just a little bit.

17 So, even if we just look at the seized drugs in  
18 this case, if we just look at Lobdell's two seizures and  
19 Forget's two seizures, you're talking about 590 pounds or  
20 264 kilograms. So we're about a quarter of the way to that  
21 thousand kilograms and that's just three seizures. That's  
22 just three instances where this organization failed and their  
23 load got picked up.

24 Lobdell testified -- let's break it down a little  
25 bit. Spinner testified he made at least 15 trips. That's

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1 1500 pounds, in addition to the seized drugs. And then  
2 Forget testified before he even started transporting loads,  
3 he counted at least 20 different times and then his -- so  
4 that's 20 more loads of at least a hundred pounds. So  
5 another 2,000 pounds.

6 Then he testified that he started transporting  
7 loads and he would go a couple times a week or at least once  
8 a week, sometimes up to two to three times a week for over a  
9 two-year period. So let's say he just drove once a week for  
10 two years. That's 24 more trips, another 2,400 pounds of  
11 marijuana. At this point we're far above the thousand kilos,  
12 far above that 2,200 pounds amount.

13 And then Lobdell testified that between '05 and  
14 '09, she made 80 to a hundred trips each at a hundred pounds.  
15 Now we're just getting, you know, 8,000 pounds of marijuana  
16 just from -- just from Lobdell. And they all testified that  
17 every single load, except for those three from Lobdell, came  
18 from the defendant's property.

19 So the government believes that the defendant knows  
20 about all these loads. He's talking to Colin and Stefan  
21 about what's coming through the property. He's getting paid  
22 by the load. All of this is reasonably foreseeable to him.  
23 And this is just three of the curriers. There are other  
24 curriers working Jacques Trepanier, the curriers moving stuff  
25 to George King. These are just three of the curriers. So,

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1 in terms of the weight, the government believes that it's  
2 well above a thousand kilograms.

3 Ladies and gentlemen, what this case boils down to  
4 is that the defendant took full advantage of the unique  
5 nature of this property, of his situation. He created this  
6 gateway. He opened up this door and this organization paid  
7 him to keep it open. He facilitated the flow of thousands  
8 and thousands of pounds of marijuana into the United States  
9 and this organization does not function without the  
10 defendant's involvement. He is the lynchpin that makes this  
11 conspiracy, this organization possible.

12 Ladies and gentlemen, I ask you to consider all the  
13 evidence in the case, look through all the evidence, the  
14 testimony, the recordings, the different exhibits, consider  
15 all of it and then the government would ask you return a  
16 verdict of guilty on the sole count in the indictment.

17 Thank you.

18 THE COURT: Mr. Sacco, when you're ready, sir.

19 MR. SACCO: Thank you, Judge.

20 Your Honor, ladies and gentlemen.

21 And thank you for listening to the proof and  
22 listening to the arguments on behalf of my client.

23 As you might imagine, the defense has a much  
24 different view of the evidence. If you remember Mr. Forget  
25 and what he said in this case, my client was involved with

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1 cigarettes, that he had trailers on his property stuffed with  
2 cigarettes and tobacco and if you recall the conversation  
3 with Mr. -- between Mr. Forget and Mr. Peters, there's a  
4 lengthy part of that conversation where it's clear to me that  
5 Forget is trying to guide the conversation to get my client  
6 to say certain things and then my client starts talking about  
7 cigarettes and Forget says cigarettes, huh, because Forget's  
8 there for a reason to try and get some sort of confession or  
9 some sort of information from my client.

10 And my client, without -- in the safety of this car  
11 talks about exactly what he does. He sells cigarettes. He's  
12 a tobacco guy. He knows Forget, because Forget told you, in  
13 his lengthy criminal history interest Canada that he was also  
14 a cigarette person. So, there's a long passage in here and,  
15 if you recall, and you'll have this in the evidence room,  
16 where my client talks about an Italian gentleman calling him  
17 from Canada and they're quoting prices, \$125 to \$225. And  
18 the Italian gentleman -- my client hangs up on him because  
19 he's trying to low ball him essentially. So he's selling  
20 tobacco and cigarettes just like Forget used to.

21 Now, with respect to the property -- and that's  
22 where I think the government's argument and the government's  
23 proof and myself deviate here and that they're convinced or  
24 they believe their evidence -- they're convinced by their  
25 evidence that my client was somehow a marijuana dealer.

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1 Well, they said in their opening and the witnesses  
2 said -- well, they said a lot of things -- but some of the  
3 things they said was that he did not sell marijuana. He did  
4 not drive marijuana himself. He did not participate in many  
5 of the things that they were doing. Now, I have -- there's  
6 some contention on whether he was a blocker and he was a  
7 scout and I'll get into that in a minute. But, what was he  
8 doing? It was his mother's property not his property. He  
9 had tobacco there. He was clearly selling tobacco. But not  
10 what they've charged him. They're not charging him with  
11 trying to sell tobacco. They're charging him with conspiring  
12 with other individuals from Canada and other places to  
13 possess and distribute marijuana.

14 So the question is, one of the questions here is:  
15 What did he -- what was he doing on that property? What role  
16 did he have, if any, in this alleged conspiracy? One of the  
17 most important things to consider is, what evidence do you  
18 have that's not biased? What evidence do you have that is  
19 not from the mouth of someone that has something to gain from  
20 this? I cross-examined the three witnesses and all three of  
21 those witnesses stated what their -- what they had to gain  
22 from this. It was Corey Spinner. There was Alain Forget.  
23 And there was Cheryl Lobdell. And I'll get to that in a  
24 minute.

25 But what other evidence do you have to look at and

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1 to scrutinize closely to determine what exactly was going on  
2 here? And I suggest to you that the most important piece of  
3 evidence that you have in the case is the transcript, the  
4 transcript that there's no -- at least for my client, doesn't  
5 have any interest in -- Mr. Forget does -- but the transcript  
6 is a piece of evidence that is not driven by self-interest.  
7 Everyone on this stand, their testimony, in my opinion, was  
8 driven by self-interest, they were trying to help themselves.

9 Now, why is that so important? The Judge will read  
10 to you what credibility means and what you need to do to  
11 assess the credibility of the various witnesses and I'm going  
12 to go through each witness one by one.

13 Corey Spinner, he's in big trouble. He is  
14 cooperating with the government. He's pled guilty to a  
15 federal crime. He's facing between 5 years and 40 years in  
16 federal prison. That's his plea agreement. If the  
17 government, in their sole discretion, is convinced that he  
18 cooperated fully, they have the power and the authority to  
19 make that different for him. Period. No question about  
20 that. He can get -- he can get a reduction in his sentence,  
21 if they recommend it, and they're the only ones that can  
22 recommend it. So, Corey Spinner, of course, was nervous.  
23 When he's up there, he's thinking am I digging myself a  
24 deeper hole or am I helping myself. That's exactly what he's  
25 thinking and he has absolute self-interest in the outcome of

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1 this case. So Corey Spinner testified and he essentially  
2 said that he saw my client there one time. I believe -- and  
3 you can look at the record and it can be read back to you --  
4 but I think he said he saw my client there one time. And he  
5 went in and he saw my client with I believe Colin Stewart and  
6 it appeared as though they were changing some money in the  
7 garage, okay.

8 Mr. Forget told you, among other things, that he  
9 was there regularly with Colin Stewart. In fact, he would --  
10 starting in 2008-2009 time frame that he recruited -- I'm  
11 sorry, Corey Spinner. And he was there. He was his  
12 right-hand person and I tried to suggest to Mr. Forget that  
13 Mr. Forget was Corey Spinner's supervisor. And he didn't  
14 quite say he was his supervisor. But I think that's a fair  
15 reading of it. Forget was Corey Spinner's supervisor. And  
16 they were there together all the time picking up marijuana  
17 for Colin Stewart and for various other people.

18 So, Spinner says that my client -- he saw my client  
19 one time out of all the times he was there. Forget says that  
20 he saw hit/miss various times and Cheryl Lobdell says that  
21 she saw him quite often there that he, in fact, paid her at  
22 various times.

23 Obviously those are inconsistent, those three  
24 positions by those three witnesses are inconsistent. And you  
25 have to ask yourself why. Corey Spinner probably has the --

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1 he doesn't know very much, right, or he didn't testify to  
2 very much. But he's in a very pretty good position.

3           Alain Forget has the most to lose because he is  
4 hoping that he will be able to convince the government that  
5 he's valuable or get the government's assistance in going  
6 forward and getting a better deal. So he is going to -- he  
7 has more motive to fabricate than any other witness.

8           And Cheryl Lobdell is a person that obviously has  
9 problems -- is obviously very nervous about her situation.  
10 She's in the middle of her jail time. She's working with the  
11 government. She agreed to cooperate with the government and  
12 she does not want that to change. So she will say many  
13 different things. She also during this period of time was  
14 going through some very difficult drug problems and abuse  
15 problems and her memory, I would say, is suspect, to say the  
16 least. She did cocaine for over 20 years. She was a  
17 alcoholic. And I would say that you should consider that,  
18 her testimony and how accurate and what sort of detail she  
19 remembers things and who she is.

20           Because Cheryl Lobdell is a person, you know, you  
21 may have never encountered a person like Cheryl Lobdell in  
22 your every day lives. It's kind of unique to a criminal case  
23 where her interests are always above your interests, whatever  
24 suits her and whatever works for her is what she's going to  
25 do. And how do we know that? Because she was working at a

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1 convenience store and she decided, instead of putting the  
2 money in the bank, she was going to write a phony deposit  
3 slip and just take it for yourself. You have to ask  
4 yourself: Do you know anyone in your lives who has done that  
5 or would do that? Would you do that yourself? And then  
6 Cheryl Lobdell -- that's one window into who she is and what  
7 her personality is and what her ability to tell truthful  
8 things is.

9 Another window is when she got caught with drugs  
10 and she agreed to work with the police and she made an  
11 agreement. I mean, that's pretty serious. Imagine  
12 yourselves, you get caught and you sit down with the police  
13 officer and the police officer says listen I'll let you go  
14 but you have to help me in order -- you have to help me. And  
15 then instead of actually helping the police, she works both  
16 sides. Now ask yourself, could you do that or would you do  
17 that? And if you -- once you make your decision, you then  
18 have to ask yourself, what does that say about the person  
19 who's providing me with what is supposed to be very important  
20 information. She'll work both sides for her own benefit.

21 And then, lastly, when she -- and there were some  
22 other things about Cheryl Lobdell. Number one, she was  
23 reporting to her probation officer during this whole time.  
24 So the obvious inference is that these she's, you know,  
25 supposedly working with the police. She's continuing to sell

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1 drugs or transport drugs. She's lying to her probation  
2 officer about that the whole time like it's not a big deal,  
3 just, just, just life. It's just what she's going to do.

4 So, I wonder when someone take the stand, what does  
5 all that disappear? Does that part of their soul and their  
6 person just disappear because they're sitting here or is that  
7 who they are and what they do? And is that important when  
8 you're thinking about wow, is she making this up or is it  
9 another crime she was involved in and she's just kind of  
10 superimposing it on the facts here because that will help  
11 her?

12 And, you know, when I say that, I have a basis to  
13 say that. She told you, in addition to the things that she  
14 allegedly did in the presence of my client, that she over a  
15 two-year period she also made 99 runs from someone named  
16 George king's place, right. 99 runs in a two-year span.  
17 It's in the record and you can look at it. So, if she made  
18 99 runs -- I think it was from '07 to '08, 2007 to 2008, I  
19 mean, she's got a vast amount of experience. She's had a  
20 vast amount of situations that she knows this business inside  
21 and out. And how easy is it for her to take a common every  
22 day situation and just superimpose it on to whatever she  
23 wants to? If something's routine, okay, then it's really  
24 easy to testify about. Because you just say I don't know  
25 when it happened. I just know it happened. Because she's

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1 been smuggling drugs for 20 years and she knows exactly how  
2 it works. So it's really easy for someone like Cheryl  
3 Lobdell who steals cash and tricks the police and tries to  
4 trick the probation department to just use generic every day  
5 knowledge and testify about it. Simple.

6 And that's why in my mind -- and hopefully in  
7 yours -- it's important to actually have some detail because  
8 when you -- when someone has to give detail in their  
9 testimony, you can actually evaluate the testimony, right. I  
10 mean, it's specific. It's a specific event at a specific  
11 time that gives you the ability to evaluate whether it's got  
12 any substance to it, whether it's true or not.

13 And I submit that Cheryl Lobdell's testimony is  
14 generic testimony without any of those hallmarks of truth,  
15 without any of those -- she's talking about generic events  
16 that she's been doing her whole life, right. Think about it.  
17 She gets back, she gets paid at the canal and someone slices  
18 open a bag of cash for, I don't know -- I don't know how much  
19 money she said was in there but a lot of money in the woods  
20 they're going to slice open a bag of cash and pay her and  
21 that somehow it was my client. Now, I don't know if that  
22 ever happened to her in her 20 years. Maybe it did somewhere  
23 along the line. But I tell you this, it wasn't my client.  
24 It wasn't outside that canal.

25 What other things did she say back up to the canal

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1 I'm sure she backed up to that canal. I'm sure she backed up  
2 to George kings's house. I'm sure she backed up to that  
3 little marina that she was talking about, Adams Marina. I'm  
4 sure she did all of this. But the question is: Was my  
5 client there when she was doing it are not? And so when you  
6 get that sort of generic testimony, it's not credible.

7 Now, Mr. Forget, he actually talked to Mr. Peters  
8 in the car and there's some very important things that I want  
9 to bring to your attention that were said during that  
10 conversation.

11 I already talked to you about the issue that it's  
12 clear from this discussion between these two that my client  
13 sells tobacco and cigarettes. It's just there's no question  
14 about that and Mr. Forget confirmed that. But that was his  
15 word, so I want something more than that and so I want the  
16 transcript where he actually says it. And they talk about  
17 the pricing and it's between 200 -- somewhere around \$225 a  
18 pound, which is a good amount of money. And you know from  
19 Mr. Forget's previous experience by getting arrested by the  
20 Canadians that, apparently, the Canadians don't like people  
21 taking tobacco up into Canada and he has gotten arrested for  
22 it. And so, if you understand that my client is actually  
23 selling tobacco and not selling marijuana, that's important.  
24 And I think the proof supports that.

25 Now, with respect to the property, Mr. Forget said

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1 many, many things. Of course, similar to Ms. Lobdell, there  
2 wasn't a lot of detail in any of it. He just said generic  
3 things because he's been either smuggling cigarettes or  
4 smuggling marijuana or whatever else for 20 years. I mean,  
5 he's a pro. He's seen every situation. It is very easy for  
6 him to mold facts I call it, right, it's very simple for him,  
7 in his experience, to mold facts.

8           And what he said was that he used to come to the  
9 canal, meet with Colin Stewart and take this stuff to his  
10 house. And then take it other places from there. What we  
11 know from Cheryl Lobdell is that he also was doing this on  
12 his own. He also had his own business that he was presumably  
13 doing this. Mr. Forget is an interesting person. He, like  
14 Cheryl Lobdell, clearly puts his interests above all else.  
15 There's no reason -- I'll withdraw that.

16           When he went on that high speed chase with the  
17 police, I mean all of those questions I asked him about that,  
18 the reason I asked him those questions is to show that he's a  
19 survivor. I mean, he -- he is a person that's so -- this is  
20 so engrained in him that he looks at everything he sees, he  
21 sees opportunity in. He's driving. He's weaving in and out,  
22 probably almost killing many people. That's okay, though,  
23 because it's his interests not theirs that's important.  
24 After he does that, I can just picture him getting to this  
25 intersection and thinking where do I go. It's like -- you

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1 ever try to catch a mouse and the mouse is all they do is  
2 survey the floor and look for a hole to get into to get away  
3 from.

4           So he gets to this intersection and we would think  
5 I'm not going to try up past someone's house where their kids  
6 could be playing or there could be something going on in the  
7 backyard and drive my car into the woods. But that didn't  
8 occur to him. What occurred to him is what can I do to get  
9 myself out of the situation. So, like any person like  
10 Mr. Forget, he drives right up behind the house I'm sure at a  
11 high rate of speed. He puts the truck into the bushes and  
12 thinking what do I do, what do I do, hiding, hiding the  
13 truck, he locks the truck. I mean, a lot of people that were  
14 being chased by the police for ten miles on a high speed  
15 chase would probably just bail out and run. But he knows.  
16 He locks the truck. He locks the truck because he's still  
17 hoping he's going to get away with it. He didn't want anyone  
18 else stealing his marijuana. Takes the keys with some so  
19 nobody can take the truck, all the time thinking, thinking,  
20 thinking about what he's going to do. Then he runs through  
21 the woods.

22           Then when he's finally caught, when he hears the  
23 dog, he hides the keys. He's still thinking about the  
24 marijuana to the end because, in his mind, he's not quite  
25 sure they know where it is. Maybe I'll go back later for it

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1 and that's what he's thinking. So, if that's not the best  
2 example of who Alain Forget is, I don't know what is.

3 And then, of course, he testified. And why I --  
4 you know, he is going to do whatever he has to do, whether  
5 it's true or not true or whether it's embellished or not  
6 embellished, to get through.

7 Now why does all this matter? Because the judge  
8 will tell you that in a situation like you're in, judging of  
9 another person on a very, very serious matter, you should  
10 scrutinize the evidence and you should scrutinize the  
11 witnesses. And I submit to you that these witnesses are not  
12 credible and they're not credible because they have too much  
13 to gain from this. And because they've shown you throughout  
14 their lives that they are not people that you would believe  
15 in a very serious matter.

16 Now what's a very serious matter, babysitting your  
17 kids, some sort of advice you might need on a life-changing  
18 event, and there's a million more examples of something very  
19 serious.

20 And this is a very serious matter for my client and  
21 the government has offered you these three people as  
22 witnesses and as evidence against him. Now would you believe  
23 anything out of their mouth in any other serious matter, if  
24 you knew what you know about them now? For me, if someone  
25 came to me and said I want, I want to sell you insurance,

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1 sir, I was like all right, let's talk about your history a  
2 little bit and then I find out that the person's been  
3 convicted of fraud three times let's say, I'd throw him out  
4 of my house. I'd throw him off the porch. I'm not going to  
5 listen to one thing they say, you know why? Because they  
6 don't rate it. Because they don't rate it. And that is  
7 credibility.

8           Some small or more minor examples of blatant what I  
9 believe lying to you under oath in this courtroom was Cheryl  
10 Lobdell talked about this interaction at Frenchie's and she  
11 was certain that my client was there and she was certain that  
12 he handed some manager a stack of cash and I think you heard  
13 from the general manager here that Cheryl Lobdell was in  
14 there by herself and that she paid for this vehicle and the  
15 only thing that happened is that that \$5,000 was transferred  
16 and someone said it must have been my client that did it,  
17 although there was not proof of that. It was just said.  
18 That's the only way it could have happened and she said that  
19 because it makes for a better story. That's it. It makes  
20 it, it's better for her, it's better for the government's  
21 case.

22           One other thing is she said and I read her grand  
23 jury testimony back to her and she said she didn't remember  
24 saying that. She clearly said -- and this is actually more,  
25 this is fairly, I believe this to be important -- she said

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1 that when some money came back -- and, of course, there's no  
2 date, time, we don't know if it happened in 1985 or 2011 but  
3 it happened in her, that when money was brought back, it was  
4 cut open. I asked her if she recalled telling the grand jury  
5 that that never happened. So, if you swear to tell the truth  
6 and you're talking to people and you say something completely  
7 different, that's important.

8 Now, Mr. Gardner mentioned on these seizures, that  
9 in 2009 there was a seizure and I don't believe there's any  
10 testimony from any credible source in this case that my  
11 client was at the docks or the canal or was blocking when  
12 that happened. I don't know, you know, he might have been in  
13 Australia.

14 And the same thing in 2011. I think this one I  
15 believe was the one with the investigator who was watching  
16 and I asked him some questions on my cross-examination and he  
17 said he didn't see anyone else there. He didn't see Allan  
18 Peters there. I asked the border patrol agents who stopped  
19 Ms. Lobdell down at the check point. They never saw my  
20 client there. There's no evidence in this case, except for  
21 words, that my client ever was a scout or a blocker. Listen,  
22 the Mohawk police are there every day on that reservation and  
23 there's no testimony from them who lived there and who are  
24 there every day and apparently personally know my client that  
25 he was driving around blocking for this. So where does it

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1    come from?  Where does that proof come from?  That proof  
2    comes from the three people who have a lot to gain and who  
3    have -- who have proven to you and shown themselves to you to  
4    be deviant people who don't tell the truth and put their  
5    interests above others.

6           And the reason that's so important to the  
7    government is because it shows this act of my client leaving  
8    Canada, coming into the United States, I mean because that's  
9    the conspiracy, right, the conspiracy is to commit a crime in  
10   the United States, not in Canada.  So, they want him moving  
11   and their proof of it is their three witnesses' words and  
12   nothing else.  And what's better is their three witnesses  
13   can't tell you any date or time.  One thing Cheryl Lobdell  
14   could say was that she met my client after getting stopped by  
15   the police to get paid at a diner.  I promise you that's a  
16   diner Cheryl Lobdell goes to herself.  She was probably a  
17   waitress there or something and knows exactly where it is and  
18   that's a great way to -- that's a great liar's trick, take a  
19   fact, something that's familiar, you know it's easy to talk  
20   about and wrap it up with something else and I submit to you  
21   that's exactly what she did.

22           Now, each one of these folks -- I want to talk  
23    about weight for just a minute.  Each one of these witnesses  
24    had a plea agreement and they all apparently were involved in  
25    this massive criminal conspiracy and all of them pled guilty

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1 to 100 kilograms or more but less than 1,000 kilograms, all  
2 of them.

3 Now, the government has shown you, through three  
4 stipulations, approximately 200 -- or 264 kilograms of seized  
5 marijuana. But, yet, they want to bring a charge against my  
6 client that he moved over a thousand or more kilograms of  
7 seized marijuana and they asked you to consider essentially  
8 the evidence of these three witnesses who just say that's  
9 what we were doing, you know, sometimes it was 80, sometimes  
10 it was a hundred, and sometimes Mr. Peters was there and most  
11 of the times he wasn't.

12 So, the question is, how much -- how can you hold  
13 my client accountable for all of the acts of these people,  
14 when there has been no proof in this case or no sufficient  
15 proof or no persuasive proof that what these people were  
16 doing, okay, either happened at his mother's property as  
17 opposed to King's and these other properties right around  
18 there or that he had any knowledge about it?

19 Now, if you'll bear with me just for a minute, I  
20 want to jump back to the transcript, okay, which I, again,  
21 view to be the best proof in the case.

22 You have to ask yourself why my client is going to  
23 drive posts and stakes in this place to not allow people to  
24 pass, if he's such a business man and this is such a  
25 lucrative endeavor for him? Why is he going to stop everyone

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1 from coming in there? I mean, if you drive posts in there  
2 and I think the gist of the conversation is that someone's  
3 going to run into it with a boat and have a surprise of their  
4 life, why would you block the canal completely? That's what  
5 he's saying he's going to do. And it's obvious from this  
6 that there's a lot of activity there, and it's out of control  
7 what's going on there.

8 And what's further is, if he's going to set up this  
9 device at the driveway side of this area to obviously do  
10 something to a car, right, there's a device that he describes  
11 in this where it would go off and scare the person or damage  
12 the car or whatever because people are going into his  
13 driveway. So why would he do that, if he wanted to engage in  
14 this, in this business? To block, apparently this canal is  
15 it. I mean, this is the most important thing to this drug  
16 organization.

17 Well, I suggest that it's not and that King's, and  
18 Adams Marina and all these other places on the St. Lawrence  
19 where Colin Stewart and all these people bring this stuff in,  
20 okay, is where these witnesses were running drugs from. Now,  
21 were they going into that canal at times? Sure, I bet they  
22 were. Were they going in at King's? Were they going in at  
23 Adams marina? Sure. Were they going in wherever they could?  
24 Sure.

25 Now, did Mr. Peters know Colin Stewart? Yes. Did

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1 he know some of these other players in this ring? Yes. But  
2 was he involved in the conspiracy or not, that's one of the  
3 questions.

4 Now, mere association because he knew these people  
5 because he lives up on this -- on the border because all  
6 these activities are going on, you're going to know people.  
7 He's running cigarettes. He's going to know people. But is  
8 he involved in this conspiracy to move all this marijuana?  
9 No, he's not.

10 And the only way that you -- the only proof that  
11 the government has offered you with respect to that is from  
12 three witnesses, three witnesses who, whose interests have  
13 overcome their ability to tell the truth.

14 So, ladies and gentlemen, I ask that you consider  
15 the evidence in this case. I ask that you read the  
16 transcript very, very closely. There's a lot of information  
17 in it. And when you read that, read the transcript and  
18 whether you consider or disregard the words that came out of  
19 the mouth of these witnesses, you have to make certain  
20 determinations. One of the determinations is the quantity of  
21 marijuana involved and the law, the judge will read it to  
22 you, you must make a determination as to the amount of  
23 marijuana he knew or reasonably could have foreseen being  
24 involved in the conspiracy.

25 One way that I suggest this to resolve this issue

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1 is that if you're not there and you're not on the phones or  
2 there's no evidence of phone calls, there's no evidence of  
3 text messages or anything else, then what should you  
4 reasonably have known was coming through your mother's  
5 property when you weren't there? How much marijuana? That's  
6 an issue you have to resolve.

7 Now, the government has given you a general  
8 proposition that everything that happened from 2005 to 2011  
9 he knew about or should have known about and he must be held  
10 accountable for that. There's been very little proof, aside  
11 from the general testimony, again, with no detail of where my  
12 client was or his knowledge.

13 So I ask you to closely scrutinize all the  
14 evidence, the testimony of these witnesses. I've outlined  
15 what I believe to be their issues with credibility because  
16 this is a criminal case. It's a very important case and it  
17 has very, very specific rules and the judge will read you  
18 those rules. And those rules must be adhered to and the  
19 rules say that if the government doesn't prove their case  
20 beyond a reasonable doubt, then you can't convict a person.  
21 Because that's the way our country works and that's the way  
22 the system is safeguarded against people like this lying and  
23 telling stories and causing other people to become convicted  
24 of a crime, a very serious crime.

25 The nature and quality of the evidence in the case

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1 is very, very important. And the nature and the quality of  
2 the evidence of this case, it may suggest something but does  
3 it prove something? Does it prove that my client was  
4 involved with all these people or does it prove that mere  
5 association is not enough to convict a person? Mere  
6 association, mere knowing, mere in the wrong place at the  
7 wrong time is not enough to convict someone.

8 If you know bad people and they're doing bad  
9 things, that's not enough to convict someone. You can't just  
10 throw up people like this to say whatever they have to say  
11 and convict someone. The law doesn't allow it. So at the  
12 end of this, my summation and the government's going to come  
13 back up here, I ask that you closely scrutinize this  
14 transcript and look at the words and that you disregard the  
15 unreliable testimony of these people. You wouldn't use their  
16 testimony in any other important decision in your life and  
17 you know that. Don't use it here when my client's life is at  
18 risk and I'm asking you to come back with a verdict of not  
19 guilty. Thank you.

20 THE COURT: Mr. Gardner, do you have any rebuttal?

21 MR. GARDNER: Briefly, your Honor.

22 Ladies and gentlemen, I'm not going to take up a  
23 lot of time. I just want to talk about a couple things  
24 briefly.

25 Obviously defense counsel spent a lot of time

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1 talking about the credibility of these witnesses and I think  
2 the government has said from its opening statements that the  
3 credibility of those witnesses was a very important part of  
4 this case and that you should look at their testimony  
5 skeptically.

6 But defense counsel said a couple of things which I  
7 thought was interesting, that these witnesses have too much  
8 to gain from their testimony. I believe he said Forget, in  
9 particular, has more motive to fabricate than any of the  
10 other witnesses, which is not really true in this case. It's  
11 kind of an unusual situation. Lobdell's already been  
12 sentenced. She's already been sentenced to 33 months. She  
13 said on the stand she doesn't expect to get anything more  
14 from her cooperation. So it's not the typical situation like  
15 Corey Spinner, who I would say has the most to gain from his  
16 testimony. He has not been sentenced yet.

17 And then Mr. Forget -- this is Government Exhibit  
18 28 -- and if you can go to the second page, Ron -- this is  
19 the letter that the government sent to Mr. Forget just a  
20 couple weeks ago because he was arrested for selling a  
21 firearm and you can go ahead and read this in its entirety.  
22 But I would just look at that second paragraph or first full  
23 paragraph. The letter says you violated your conditions of  
24 release and then it says, "as a result, the U.S. Attorney's  
25 office has determined that you have breached both your plea

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1 and cooperation agreements. The United States Attorney  
2 office has decided to void your cooperation agreement. In  
3 addition, at the time of sentencing, the government will make  
4 no motion for a downward departure, meaning the government's  
5 not going recommend that Forget get anything for his  
6 cooperation. And he knows that. I think it was the last  
7 thing he said on the stand. He doesn't expect anything from  
8 his testimony.

9 Now, are these people good people? No. No,  
10 they're not good people, none of them, even Corey Spinner,  
11 they're drug dealers. Lobdell stole money. Forget is a  
12 terrible person. He led police on a high speed chase and I  
13 meant it when I asked him, he could have killed people.

14 And the test, ladies and gentlemen, isn't as  
15 defense counsel suggests that would you hire them to be your  
16 babysitter -- I don't think that's exactly what he said,  
17 that's not the issue. Of course you wouldn't have them be  
18 your babysitter.

19 But I would encourage you not to look at their  
20 testimony in a vacuum and not to assume just because they're  
21 not very good people doesn't mean that what she said isn't  
22 absolutely accurate. And really look at all of the evidence  
23 in the case. You don't have to parse out and say, well, let  
24 me look at Lobdell's testimony and see if I believe it  
25 because she stole \$5,000 in 2006. That's not the way it

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1 works. Look at everything. Look at the entire case. And I  
2 just want to point out a couple things quickly and then I'll  
3 sit back down.

4 Defense counsel talked about George King quite a  
5 bit and I think it's very confusing the way that he was  
6 describing. There's King's marina that's discussed on the  
7 transcript. That is not George King's residence. Lobdell  
8 and Forget both said they transported loads to George King's  
9 residence, which is in Malone. It's not a marina. So, the  
10 only time that any of those three witnesses picked up  
11 anywhere other than the defendant's mother's property was  
12 three times that Lobdell picked up at Adams Marina.

13 So, this whole thing about George King -- I don't  
14 want to say it's a nonissue -- but that's not another marina  
15 that this organization was using. George King's residence --  
16 and Lobdell said it very clearly -- is a residence in Malone.  
17 And, please, you don't have to take my word for it. You can  
18 go back and look at the transcripts.

19 Defense counsel also talked about the fact that  
20 Lobdell said that she went to Frenchie's with the defendant  
21 and that that was inconsistent with Mr. Miller's testimony.  
22 Mr. Miller said that Ms. Lobdell came in at three different  
23 occasions. She paid the money on the 19th. She came in for  
24 instructions about what to do about the car on 20th and on  
25 the 21st she took possession of the vehicle. He also

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1 testified that he's not the salesman. So I don't know that  
2 he was there the entire time and there's no reason to think  
3 that Lobdell did not testify credibly. We have the  
4 defendant -- the cash receipt from the defendant showing he's  
5 involved in this transaction. Mr. Miller talked about how  
6 when he came back in and said I don't want that car right now  
7 but I need you to shred the paperwork. That's what's  
8 important about that testimony, that's what's the important  
9 part of that testimony.

10 Defense counsel was talking about the March 1st  
11 2011 seizure that detective Jim Sunday was -- observed  
12 Lobdell's vehicle come from Marie Peters' residence and I  
13 think he tried to imply that Jim Sunday could see the docks  
14 and see the canal and he didn't see the defendant. It's not  
15 what he said. He actually specifically said he could not see  
16 the residence and he could not see the water or the canal  
17 from his location. He saw the head lights coming from that  
18 area and then pass his location. Actually, I think he pulled  
19 out in front of them.

20 And I agree with defense counsel, the recorded  
21 conversation that defense counsel quoted the transcript I  
22 think is the most important piece of evidence in this case.  
23 It's the defendant talking about this conspiracy in his own  
24 words while this conspiracy is going on and he did talk about  
25 cigarettes, okay. He also smuggles cigarettes. I'm not sure

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1 what that has to do with this case. He isn't charged with  
2 smuggling cigarettes. He's charged with being involved in a  
3 conspiracy to possess, with intent to distribute, marijuana.  
4 And that conspiracy, it doesn't matter that he was partly in  
5 Canada for that conspiracy. It doesn't matter if he ever  
6 even crossed the border. It doesn't matter that he ever  
7 picked up a bag of marijuana. All that matters is that there  
8 was a conspiracy to commit these illegal acts and the  
9 defendant did something to further that conspiracy. And  
10 that's what you heard from these witnesses, that he did a  
11 bunch of things, but the most important thing is that he kept  
12 this doorway open and that this organization was paying him  
13 for that service and that's what his role in this conspiracy  
14 is.

15 And just one other, one other point quickly,  
16 defense counsel implied that there was inconsistencies in the  
17 testimony between the three cooperating witnesses and defense  
18 talked a lot about wanting dates and times. I think that  
19 is -- you all have common sense, you all have a understanding  
20 of the ways of the world. If I asked you each an important  
21 event that occurred five or six years ago, would you be able  
22 to tell me the date and time and that's what defense counsel  
23 wants with these witnesses. They provided detailed testimony  
24 about what they did. Did they pin it down to an exact date?  
25 No.

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1           And the other thing defense counsel talked about  
2           was that he was implying that Corey Spinner and Forget and  
3           Lobdell were always at the canal together at the same time,  
4           that they couldn't have had any interactions with the  
5           defendant unless all three of them were there. That's not  
6           really what the testimony was; in fact, that's not what the  
7           testimony was at all.

8           Lobdell was a part of this organization since the  
9           early '90s and she really became a part of the organization  
10          2005. Several years before Forget became involved, Forget  
11          said that he scouted 20 different times before he recruited  
12          Corey Spinner into this organization. So they had many, many  
13          interactions with the defendant and before Corey Spinner ever  
14          became involved again.

15          Ladies and gentlemen, please look at all the  
16          evidence in the case and evaluate their testimony. Their  
17          testimony is not without corroboration and that's why I spent  
18          so much time going through all the other evidence in the  
19          case. That's why we took the time to present something other  
20          than just Forget or just Lobdell.

21          And, again, the government would ask that you  
22          return a verdict of guilty on the sole count in the  
23          indictment.

24          THE COURT: Okay, ladies and gentlemen, that  
25          includes the proof and the arguments in the case. I'm going

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1 to charge you on the law.

2 But before I do that, it's almost 10:40. I'm going  
3 to give you a break, go into the jury room and stretch.

4 Have you ordered your lunch? That's been done,  
5 good. So we'll take a short, five-, ten minute break. Let  
6 you stretch, wake up a little bit, get recharged and come  
7 back out here and I'll give you the most exciting part of the  
8 case and that's the law that I'm going to read to you, okay.

9 Go ahead. Don't discuss the case yet, please.

10 (Jury excused.)

11 THE COURT: Okay. Brief recess, use the facilities  
12 and please come right back whatever you do and we'll get the  
13 jury charged.

14 THE CLERK: Court's in recess.

15 (Recess taken, 10:35 a.m.)

16 (Open court, 10:50 a.m.:)

17 THE COURT: We're going to bring the jury in.  
18 Okay. The record should reflect we have the ladies and  
19 gentlemen of the jury, the defendant, defense counsel, and  
20 the assistant United States Attorney.

21 Ladies and gentlemen, we're at the point of trial  
22 where I'm going to charge you on the law and I have 31 pages  
23 of legal instructions to read to you. I don't want that to  
24 make you nervous. I want you to relax and just listen, okay,  
25 and I'm going to tell you why.

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1           I have a copy for each one of you of this to send  
2 in to you, should you have any questions about what I've said  
3 or what I've read. And this jury instruction has a table of  
4 contents so you can find things quickly, if there is some  
5 question about some instruction that I've given to you. So  
6 it should be very straight forward and so just relax and  
7 listen. All right.

8           As I've indicated, there's a table of contents and  
9 then we're going to get right to the roles of the Court and  
10 the jury.

11           Now that you've heard all the evidence and the  
12 arguments of counsel, it is my duty to instruct you on the  
13 law applicable to this case. Your duty, as jurors, is to  
14 determine the facts of this case on the basis of admitted  
15 evidence. Once you have determined the facts, you must  
16 follow the law as I state it and apply the law to the facts  
17 as you find them. You are not to consider one instruction  
18 alone as stating the law but you are to consider the  
19 instructions as a whole. If an attorney has stated a legal  
20 principle different from any that I state to you in my  
21 instructions, it is my instructions that you must follow.

22           You should not concern yourself with the wisdom of  
23 any rule of law. You are bound to accept and apply the law  
24 as I give it to you, whether or not you agree with it.

25           In deciding the facts and applying the law of this

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1 case, you must not be swayed by feelings of bias, prejudice,  
2 sympathy toward any party. The government and the defendant,  
3 as well as the general public, expect you to carefully and  
4 impartially consider all the evidence in this case, follow  
5 the law as stated by the Court, and reach a decision  
6 regardless of the consequences.

7           Nothing I say in these instruction is to be taken  
8 as an indication that I have any opinion about the facts of  
9 the case or what that opinion may be. It is not my function  
10 to determine the facts. That's your function.

11           The role of the attorneys. The function of  
12 attorneys is to call your attention to those facts that are  
13 most helpful to their side of the case what. The attorneys  
14 say, however, is not binding on you and in the final  
15 analysis, your recollection and interpretation of the  
16 evidence controls your decision.

17           Let me further elaborate on the role of attorneys.

18           Our courts operate on an adversary system in which  
19 we hope that the truth will emerge through the competing  
20 presentations of the adverse parties. It is the role of the  
21 attorneys to press as hard as they can for their respective  
22 positions. In fulfilling that role, they have not only the  
23 right, but the obligation, to make objections to the  
24 introduction of evidence they feel is improper.

25           The application of the rules of evidence is not

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1 always clear and attorneys often disagree. It has been my  
2 job as the judge to resolve these disputes. It is important  
3 for you to realize, however, that my rulings on evidentiary  
4 matters have nothing to do with the ultimate merits of the  
5 case and are not to be considered as points scored for one  
6 side or the other.

7 Similarly, one cannot help becoming involved with  
8 the personalities and styles of the attorneys. However, it's  
9 important for you, as jurors, to recognize that this is not a  
10 contest between attorneys. You are to decide this case  
11 solely based on the evidence. Remember, statements and  
12 characterizations of the evidence by the attorneys are not  
13 evidence. Insofar as you find their opening and/or closing  
14 arguments helpful, take advantage of them. But keep in mind  
15 that it is your memory and your evaluation of the evidence in  
16 this case that counts.

17 In addition, you must not infer from anything I  
18 have said during this trial that I hold any views for or  
19 against either the government or the defendant. In any  
20 event, any opinion I might have is irrelevant to your  
21 decision.

22 The government as a party. You are to perform the  
23 duty in finding the facts without bias or prejudice as to any  
24 party. You are to perform your final duty in an attitude of  
25 complete fairness and impartiality. The case is important to

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1 the government because the enforcement of criminal laws is a  
2 matter of prime concern to the community. It is equally  
3 important to the defendant who is charged with a serious  
4 crime.

5 The fact that the prosecution is brought in the  
6 name of the United States of America entitles the government  
7 to no greater consideration than that afforded to any other  
8 party of a litigation. By the same token, it is entitled to  
9 no less consideration. All parties, whether government or  
10 individuals, stand as equals at the bar of justice. The  
11 question before you can never be will government win or lose  
12 the case. The government always wins when justice is done,  
13 regardless of whether the verdict is guilty or not guilty.

14 Let's talk about the nature of evidence.

15 Testimony, exhibits and stipulations of fact. As I  
16 stated earlier, your duty is to determine the facts, based on  
17 the evidence I have -- evidence that has been admitted in  
18 this case.

19 The term evidence includes the sworn testimony of  
20 witnesses, both on direct examination and cross-examination;  
21 the exhibits received into evidence regardless of who have  
22 may have produced them; and, three, any facts to which the  
23 attorneys have agreed or stipulated to.

24 Regarding the first form of evidence; that is sworn  
25 testimony.

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1           Arguments and statements of the attorneys,  
2 questions to witnesses, and material excluded by my rulings  
3 are not evidence. For example, at times during the trial, a  
4 lawyer on cross-examination may have incorporated into a  
5 question a statement that assumes certain facts to be true  
6 and asked the witness if that statement was true. If the  
7 witness denied the truth of the statement and if there is no  
8 evidence in the record providing that the assumed fact is  
9 true, then you may not consider the fact to be true simply  
10 because it was contained in the lawyer's question.

11           Similarly, at times during the trial I sustained  
12 objections to questions and either prevented a witness from  
13 answering or ordered an answer stricken from the record. You  
14 may not draw inferences from unanswered questions and you may  
15 not consider any responses that I ordered stricken from the  
16 record.

17           Regarding the second form of evidence; that is  
18 exhibits. Exhibits that have been marked for identification  
19 but not received may not be considered by you as evidence.  
20 Only those exhibits received may be considered as evidence  
21 and those will be provided to you.

22           Regarding the third form of evidence and that is  
23 stipulations. The parties here have entered into three such  
24 stipulations of fact regarding the confiscation and testing  
25 of marijuana.

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1           You may accept a stipulation or stipulations as  
2 evidence and regard that fact or those facts as proved, that  
3 they've been proven. However, you are not required to do  
4 this, since you are the sole judges of the fact. It's up to  
5 you to decide.

6           You consider the evidence in light of your own  
7 common sense and experience and you may draw reasonable  
8 inferences from the evidence. However, you are to base your  
9 verdict only on the evidence received in the case. Anything  
10 you may have seen or heard about this case outside the  
11 courtroom is not evidence and must be entirely disregarded.

12           Direct and circumstantial evidence. As I explained  
13 to you during my preliminary instructions at the start of the  
14 trial, the law recognizes two types of evidence, direct and  
15 circumstantial. Now that the trial is over, a more elaborate  
16 instruction on the subject is appropriate.

17           Direct evidence is evidence that proves a disputed  
18 fact directly. For example, when a witness testifies to what  
19 he or she saw, heard or observed, that is called direct  
20 evidence.

21           Circumstantial evidence is evidence that tends to  
22 prove a disputed fact by proof of other facts. I will give  
23 you an example other than that snow example that I gave you  
24 during my preliminary instructions. Suppose that when you  
25 came into the courthouse today the sun was shining and it is

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1 and it was a nice day but the courtroom blinds were drawn and  
2 you cannot look outside. Then later, as you were sitting  
3 here, someone walked in with a dripping wet umbrella and soon  
4 after, somebody else walked in with a dripping wet rain coat.  
5 Now, on our assumed facts, you can't look outside the  
6 courtroom and you cannot see whether or not it's raining so  
7 you have no direct evidence of that fact. But, on the  
8 combination of the facts about the umbrella and the rain  
9 coat, it would reasonable for you to infer that it's begun to  
10 rain outside.

11 That is all there is to circumstantial evidence.  
12 Using your reason and experience, you infer from established  
13 facts the existence or the nonexistence of some other fact.  
14 Please note, however, that it is not a matter of speculation  
15 or guess. It is a matter of logical inference, all right.  
16 It makes sense. Your common sense is so important when  
17 you're deciding the facts of the case. Things in your every  
18 day ordinary life and common sense, vital in your  
19 considerations.

20 The law makes no distinction between  
21 circumstantial, direct -- direct and circumstantial evidence.  
22 Circumstantial evidence is of no less value than direct  
23 evidence and you may consider either or both and may give  
24 them such weight as you conclude is warranted.

25 An indictment is not evidence. As I explained to

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1 you during my preliminary instructions and during jury  
2 selection, the defendant has been charged with a crime about  
3 which I will further instruct you shortly. The instrument  
4 through which they -- those charges have been brought is  
5 called an indictment. The indictment is not evidence.  
6 Rather, it is merely an accusation describing the charge made  
7 against the defendant. As a result, it may not be considered  
8 by you as any evidence of guilt of the defendant.

9 Potential punishment is not evidence. Similarly,  
10 the question of possible punishment of the defendant should  
11 be of no concern to you and you should not, in any sense,  
12 enter into -- or let it enter into or influence your  
13 deliberations. The duty of imposing a sentence rests  
14 exclusively upon the Court. Your function is to weigh the  
15 evidence in the case and determine whether or not the  
16 defendant is guilty beyond a reasonable doubt, solely on the  
17 basis of such evidence. Under your oath as jurors, you  
18 cannot allow consideration of the punishment which may be  
19 imposed upon the defendant, if he is convicted, to influence  
20 your verdict in any way, or, in any sense, enter into your  
21 deliberations. And I want to emphasize that. There's been a  
22 lot of testimony in this case about some of these cooperating  
23 witnesses and what sentences they were facing, what they may  
24 be looking at. It's no consideration of yours with regard to  
25 this defendant in deciding what the facts are of this case in

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1 reaching your ultimate decision in a verdict in this case.  
2 Should never enter into your discussion, that is the sole  
3 function of this court.

4 Evaluation of evidence.

5 Verdict based on evidence not sympathy. Under your  
6 oath as jurors you are not to be swayed by sympathy. You are  
7 to be guided by the evidence in this case. The crucial hard  
8 core question that you must ask yourself as you sift through  
9 the evidence is this: Has the government proven the guilt of  
10 the defendant beyond a reasonable doubt.

11 It is for you alone to decide whether the  
12 government has proven that the defendant is guilty of the  
13 crime charged solely on the basis of the evidence and subject  
14 to the law as I charge you. It must be clear to you that,  
15 once you -- it must be clear to you that, once you let fear  
16 or prejudice or bias or sympathy interfere with your  
17 thinking, there is a risk that you will not arrive at a true  
18 and just verdict. Those emotions, those things have no place  
19 in your deliberations or your decision.

20 If you have a reasonable doubt as to the guilt of  
21 the defendant, then you should not hesitate for any reason to  
22 render a verdict of acquittal. But, on the other hand,  
23 should you find that the government has met its burden of  
24 proving the guilt of the defendant beyond a reasonable doubt,  
25 then you should not hesitate, because of sympathy or any

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1 other reason, to render a verdict of guilty.

2 Improper considerations: Race, religion, national  
3 origin, sex or age.

4 Your verdict must be based solely on the evidence  
5 developed at trial or the lack of evidence. It would be  
6 improper for you to consider, in reaching your decision as to  
7 whether the government sustained its burden of proof, any  
8 personal feelings you may have about a defendant's race,  
9 religion, national origin, sex or age. All persons are  
10 entitled to the presumption of innocence and the government  
11 has the burden of proof, as I will discuss in a moment.

12 It would be equally improper for you to allow any  
13 feelings you might have about the nature of the crime charged  
14 to interfere with your decision-making process.

15 To repeat, your verdict must be based exclusively  
16 upon the evidence or the lack of evidence in this case that's  
17 been presented in this courtroom and on nothing else. Those  
18 are issues that we talked about right from the very start of  
19 this case in jury selection.

20 Quality not the quantity of the evidence. The fact  
21 that one party has introduced more evidence than the other  
22 does not mean that you should find facts in favor of the side  
23 offering more evidence. It is quality of the evidence that  
24 governs not the quantity. As a matter of fact, the defendant  
25 in a criminal case is under no obligation to present any

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1 evidence, which we also have discussed in the beginning of  
2 this case.

3 All right. Let's talk about credibility of  
4 witnesses.

5 You have had the opportunity to observe all the  
6 witnesses. It is now your job to decide how believable each  
7 witness was in his or her testimony. You are the sole judges  
8 of the credibility of each witness and of the importance of  
9 his or her testimony.

10 In evaluating the witness' testimony you should use  
11 all the tests for truthfulness that you would use in  
12 determining matters of importance to you in your every day  
13 life. You should consider any bias or hostility the witness  
14 may have shown for or against any party, as well as the  
15 interest the witness may have in the outcome of the case.  
16 You should consider the following: One, the opportunity the  
17 witness had to see, hear and know the things about which he  
18 or she testified; two, the accuracy of the witness' memory;  
19 three, his or her candor or lack of candor; four, the  
20 reasonableness and probability of the witness' testimony;  
21 five, the testimony's consistency or lack of consistency;  
22 and, six, its corroboration or lack of corroboration with  
23 other credible testimony.

24 In other words, what you must try to do in deciding  
25 credibility is to size up the witness in light of his or her

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1 demeanor, the explanations given, and all the other evidence  
2 in the case. Always remember that you should use your common  
3 sense and your good judgment and your own life experiences.

4 The existence or non-existence of a fact is not  
5 determined by the number of witnesses called. Again, your  
6 concern is not with the quantity, but the quality of the  
7 evidence.

8 Impeachment by prior inconsistent statement.

9 You have heard counsel argue that the witnesses  
10 made statements on earlier occasions that counsel maintains  
11 are inconsistent with those witnesses' trial testimony.  
12 Evidence of prior inconsistent statement is not to be  
13 considered by you as affirmative evidence. However, any  
14 evidence of a prior inconsistent statement may be considered  
15 by you for the more limited purpose of helping you decide  
16 whether to believe the trial testimony of the witness you  
17 find to have contradicted himself or herself. If you find  
18 that the witness made an earlier statement that conflicts  
19 with his or her trial testimony, you may consider that fact  
20 in deciding how much of his or her trial testimony, if any,  
21 to believe.

22 In making this determination, you may consider the  
23 following: Whether the witness purposely made a false  
24 statement or whether it was an innocent mistake; whether the  
25 inconsistency concerns an important fact or whether it had to

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1 do with a minor detail; whether the witness had an  
2 explanation for the inconsistency and whether the explanation  
3 appealed to your common sense.

4 It is exclusively your duty, based on all the  
5 evidence and your own good judgment, to determine whether the  
6 prior statement was inconsistent and, if so, how much, if  
7 any, weight should be given to the inconsistent statement in  
8 determining whether to believe all or part of the witness'  
9 testimony.

10 Failure of the defendant to testify.

11 In a criminal case, the defendant cannot be  
12 required to testify. In this case, the defendant did not  
13 testify. Under our Constitution, he has an absolute right  
14 not to testify. The fact that he did not testify must not be  
15 discussed or considered by you in any way in deliberating and  
16 arriving at your verdict. No inference of any kind may be  
17 drawn from the fact that the defendant decided to exercise  
18 his privilege under the Constitution not to testify.

19 The law never imposes upon a defendant in a  
20 criminal case the burden or duty of calling any witness or  
21 producing any evidence. Rather, the government has the  
22 burden of proof to prove this case beyond a reasonable doubt.  
23 The defendant does not have the burden of proof to prove he  
24 is innocent.

25 Let's talk about accomplice testimony. And we had

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1 at least three witnesses in this nature.

2           You have also heard the testimony of accomplice  
3 witnesses. The Court would like to point out two things with  
4 regard to this testimony. First, it is up to you to  
5 determine the credibility of this testimony. In making this  
6 determination, I urge you to keep in mind that, in the  
7 prosecution of crime, the government is frequently called  
8 upon to use persons who have been accomplices. Often it has  
9 no choice. After all, the government must rely upon  
10 witnesses to the transactions, whomever they are; otherwise,  
11 in many instances, it would be difficult to detect and  
12 prosecute wrongdoers. This is particularly so in cases where  
13 a conspiracy is involved. Frequently, it happens that only  
14 those on the inside of the venture can give evidence which is  
15 material and important to the case.

16           The law lays down several rules that govern your  
17 treatment of accomplice testimony. In the first place, it is  
18 no concern of yours or mine why the government chose not to  
19 charge a certain person or to treat others with leniency.  
20 The decision of who should be prosecuted and to what degree  
21 is a matter which the Constitution and statutes of the United  
22 States delegates solely to the Attorney General of the United  
23 States and the United States Attorneys, who, acting under his  
24 authority, carry out his Constitutional mandate. The  
25 Constitution and statutes of the United States do not give

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1 you or me any authority to supervise the exercise of this  
2 responsibility. Further, if you come to the conclusion that  
3 an accomplice witness has given reliable testimony, you are  
4 required to act upon it exactly as you would act on any other  
5 testimony you find to be reliable, even though you may  
6 thoroughly dislike the witness who provided the testimony.

7           However, it is also the case that accomplice  
8 testimony is of such a nature that it must be scrutinized  
9 with great care and viewed with particular caution when you  
10 decide how much of the testimony to believe. There is no  
11 requirement that the testimony of an accomplice be  
12 corroborated or supported by other evidence. A conviction  
13 may rest upon the testimony of an accomplice alone, if you  
14 believe it. Therefore, in considering the testimony of an  
15 accomplice, you should ask yourself whether these so-called  
16 accomplices would benefit more by lying or by telling the  
17 truth. In addition, ask yourselves, was there their  
18 testimony made up in any way because they believed or hoped  
19 that they would somehow receive favorable treatment by  
20 testifying falsely or did they believe -- excuse me, or did  
21 they believe that their interests would be best served by  
22 testifying truthfully. If you believe that the witness was  
23 motivated by hopes of personal gain, was the motivation one  
24 which would cause him or her to lie or was it one which would  
25 cause him or her to tell the truth? Did this motivation

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1 color his or her testimony? Ultimately, it is your job to  
2 determine the credibility of these and all the other  
3 witnesses and you should look at all the evidence in deciding  
4 what credence and what weight, if any, you want to the give  
5 to these witnesses.

6 And, again, I emphasize, your common sense and you  
7 every day life's experiences in deciding what you believe and  
8 what you don't believe and looking at the entirety of the  
9 evidence, okay. You look at all the witnesses in that light  
10 in deciding what to believe and not to believe.

11 Purpose for which the testimony was introduced.

12 Second, regardless to the degree which you find the  
13 accomplice witness's credible or incredible, it is important  
14 to keep in mind that the testimony of certain prior bad acts  
15 that they spoke of -- that is, incidents of illegal activity  
16 involving a defendant -- was not introduced to prove that the  
17 defendant's character or to prove that the conduct with which  
18 the defendant is charged was in conformity with another  
19 individual's past behavior. Instead, the evidence of these  
20 prior acts was introduced merely for the purpose of  
21 attempting to prove the defendant's intent and knowledge  
22 pertaining to the crime with which he was charged.

23 To be clear, these prior bad acts and the  
24 accomplice witnesses -- that the accomplice witnesses  
25 provided testimony about were not alleged in the indictment.

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1           And going along with this I'm going to talk about  
2 evidence of uncharged conduct, which you heard. There's one  
3 charge here that you need to decide but there's been a lot of  
4 testimony about activity that was not included in the  
5 indictment.

6           So, the government has offered evidence tending to  
7 show the existence of other criminal relationships between  
8 the defendant and a witness who has testified for the  
9 government. Specifically, you have heard in this trial  
10 concerning allegations that, during the course of the  
11 conspiracy, there was an attempt to smuggle guns into Canada  
12 using the defendant's property, which the government contends  
13 is the same manner in which marijuana was smuggled into the  
14 United States from Canada.

15           In that connection, let me remind you that the  
16 defendant is not on trial for committing any acts that are  
17 not alleged in the indictment. Accordingly, you may not  
18 consider this evidence of the other conduct as a substitute  
19 for proof that the defendant committed the crime charged in  
20 the indictment. Nor may you consider this evidence as proof  
21 that defendant has a criminal personality or bad character.  
22 The evidence of the other conduct was received into evidence  
23 for a much more limited purpose and you may consider it for  
24 that limited purpose.

25           More specifically, evidence of this other conduct

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1 was received into evidence for the purpose of helping you  
2 understand the background, history and nature of the  
3 relationship between the defendant and the government's  
4 witnesses. In addition, evidence of this other conduct was  
5 received into evidence as relevant to establish the  
6 defendant's state of mind in carrying out acts charged in the  
7 indictment. For example, if you determine that the defendant  
8 committed the acts charged in the indictment, as well as the  
9 acts involved until other conduct, then you may, but you need  
10 not draw an inference that, in doing the acts charged in the  
11 indictment, the defendant acted knowingly and intentionally  
12 and not because of some mistake, accident or other innocent  
13 reasons.

14           These are the sole purposes for which you may  
15 consider evidence of prior relationship between the defendant  
16 and the government's witnesses. Evidence that other --  
17 evidence of other conduct may not be considered by you for  
18 any other purpose. Specifically, you may not use as evidence  
19 to conclude that, because the defendant committed the facts  
20 involved in the other conduct, he must also have committed  
21 the acts charged indictment. Nor may you consider any  
22 evidence that the defendant may have engaged in any prior  
23 criminal conduct. Any prior criminal conduct of the  
24 defendant which may have been mentioned or presented through  
25 any evidence is not relevant and may not be considered by

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1 you. Once again, I stress that the defendant is not on trial  
2 for committing any acts that are not alleged in the  
3 indictment. Okay.

4 So that other conduct evidence is offered for a  
5 very limited purpose to show intent, lack of mistake, all of  
6 the things that I have mentioned and that's the way that that  
7 needs to be evaluated.

8 Use of undercover agents and informants.

9 You have heard testimony that an informant was used  
10 by the government to investigate alleged unlawful testimony.  
11 There is nothing improper with the government using this  
12 technique. Indeed, certain types of activity would be  
13 extremely difficult to detect without the use of informants.  
14 Whether or not you approve the use of informants to detect  
15 unlawful activities, it is not to enter into your  
16 deliberations in any way.

17 Evidence obtained through searches.

18 During the trial you have heard testimony that law  
19 enforcement officers obtained certain pieces of evidence by  
20 conducting searches and you are instructed, as a matter of  
21 law, that the evidence obtained in these searches is a proper  
22 form of evidence and may be considered by you, just as you  
23 consider any other evidence.

24 In addition, the government has offered evidence in  
25 the form of recordings of telephone calls and text messages

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1 between the defendant and others or between the accomplice  
2 witnesses which were obtained without the knowledge of one of  
3 the parties to the conversation. The recordings were  
4 lawfully obtained. The use of this procedure to gather  
5 evidence is perfectly lawful and the government is entitled  
6 to use such recordings in this case.

7 Transcripts of audio recordings and text messages.

8 In addition, with regard to the audio recordings,  
9 certain typewritten transcripts were provided to you. These  
10 transcripts which purport to identify the speakers engaged in  
11 oral conversations were provided to you for the limited and  
12 secondary purpose of aiding you in following the content of  
13 the conversations as you listened to the audio recordings and  
14 aiding you in identifying the speakers.

15 However, you are specifically instructed that,  
16 whether the transcripts correctly or incorrectly reflect the  
17 content of the conversations or the identity of the speakers,  
18 is entirely for you to determine based on your own evaluation  
19 of the testimony you have heard concerning the preparation of  
20 the transcripts and from your own examinations of transcripts  
21 in relation to your hearing of the audio recordings  
22 themselves. If you've noticed a difference between what you  
23 heard on the recordings and what you read in the transcripts,  
24 you must rely on what you heard, not on what you read.  
25 Similarly, if you could not hear or understand certain parts

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1 of the recordings, you must ignore the transcripts as far as  
2 those parts are concerned. All right. In other words, it  
3 always goes back to that very initial basic rule: It's your  
4 interpretation and finding of the evidence that matters,  
5 okay.

6 Variance in dates -- immaterial.

7 You will note that the indictment charges that the  
8 offense alleged was committed between "in or about" a certain  
9 year "on or about" a certain date. The government does not  
10 have to prove with certainty the exact date of the alleged  
11 offense. It is sufficient if the government proves beyond a  
12 reasonable doubt that the offense was committed on dates  
13 reasonably near the dates alleged.

14 Let's talk about the burden of proof.

15 Now, before discussing the alleged crime charged  
16 here, I want to remind you that the indictment here is a mere  
17 accusation. It is not evidence and you are to draw no  
18 inference of guilt from the mere fact the defendant has been  
19 charged. As a result, in reaching your determination of  
20 whether the government has proved the defendant guilty beyond  
21 a reasonable doubt, you may consider only the evidence  
22 introduced or lack of evidence.

23 Defendant has no burden of proof whatsoever in this  
24 case. He is under no obligation to produce any witnesses.  
25 He is presumed to be innocent and the presumption of

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1 innocence continues through the trial and during your  
2 deliberations. The presumption of innocence is overcome,  
3 when, and only when, the government establishes the guilt of  
4 the defendant by proving each element of the offense you are  
5 considering beyond a reasonable doubt.

6 Now, what do I mean by beyond a reasonable doubt?  
7 It is not some vague or speculative doubt. As the phrase  
8 implies, a reasonable doubt is a doubt that is based upon  
9 reason, a reason that appears in the evidence or in the lack  
10 of evidence. The government is not required to prove a  
11 defendant guilty beyond every conceivable or every possible  
12 doubt. Nor is government required to prove the defendant  
13 guilty to an absolute mathematical certainty, because, of  
14 course, in human affairs, that is usually impossible. But,  
15 you should review all the evidence as you remember it, sift  
16 out what you believe, discuss it, analyze it, compare your  
17 views of the evidence with that of your fellow jurors, and,  
18 if that process produces in your mind some belief or  
19 conviction that you would be willing to accept without  
20 further hesitation, then you may say that you have been  
21 convinced beyond a reasonable doubt.

22 On the other hand, if going through that same  
23 process in your mind, your mind is wavering or is so  
24 uncertain that you would hesitate before acting, if it were  
25 an important matter of your own, then you have not been

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1 convinced beyond a reasonable doubt.

2 We're going to talk now about the substantive law.

3 Count 1 of the indictment charges the defendant in  
4 this case with conspiracy to knowingly distribute or to  
5 knowingly possess with intent to distribute, a controlled  
6 substance, in violation of Title 21, United States Code,  
7 Section 846 and 841(a)(1). As I stated earlier, in order for  
8 you to find that the defendant is it guilty on this count,  
9 the government must prove beyond a reasonable doubt each of  
10 that count's elements, which I will now discuss with you.

11 Count 1, conspiracy to knowingly distribute or to  
12 knowingly possess with intent to distribute, a controlled  
13 substance. Title 21, United States Code, Section 846  
14 provides as follows: "Any person who attempts or conspires  
15 to commit any offense defined in this subchapter shall be  
16 subject to the same penalties as those prescribed for the  
17 offense, the commission of which is the object of the attempt  
18 or conspiracy". Among the offenses defined in this  
19 subchapter, and referenced in Count 1 of the indictment, is  
20 the knowing distribution, or knowing possession with intent  
21 to distribute, a controlled substance, in violation of  
22 Title 21, United States Code, Section 841(a)(1).

23 The target crime in the Count 1 conspiracy is the  
24 distribution of or possession with the intent to distribute  
25 marijuana. Marijuana is a controlled substance, as that

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1 phrase is used in these instructions, the indictment and the  
2 statute.

3 As a result, in order to satisfy its burden of  
4 proof with regards to Count 1, the government must establish  
5 each of the following three elements beyond a reasonable  
6 doubt:

7 First, that the conspiracy, agreement or  
8 understanding to distribute or to possess with intent to  
9 distribute marijuana as described in the indictment was  
10 willfully formed, reached or entered into by two or more  
11 persons and existed at or about the time alleged;

12 Second, that at some time during the existence or  
13 life of the conspiracy, the defendant knew the purpose of the  
14 agreement and then knowingly and willfully became a member of  
15 the conspiracy;

16 And, three, that the conspiracy involved the  
17 distribution of or possession with intent to distribute  
18 marijuana. Those three elements.

19 Having briefly described these three elements, I  
20 will now discuss the law regarding conspiracy generally and I  
21 will discuss the elements in more detail.

22 Let's talk about the first element.

23 To prove the first element, the existence of the  
24 conspiracy, the government must prove that two or more  
25 members positively or tacitly came to an understanding to

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1 accomplish the unlawful objective alleged in the indictment.  
2 This would mean that the defendant and others agreed or came  
3 to an understanding to knowingly and intentionally distribute  
4 or possess with intent to distribute marijuana.

5           Mere similarity of conduct among various persons  
6 and the fact that they may have associated with each other,  
7 assembled together and discussed common aims and interests  
8 does not necessarily establish that a conspiracy existed.  
9 However, the evidence in the case need not show that the  
10 members entered into any formal or express agreement or that  
11 they directly by spoken words or in writing stated between  
12 themselves what their object or purpose was to be or the  
13 details thereof or the means by which the object or purpose  
14 was to be accomplished. It is not necessary to show that  
15 each member of the conspiracy, a so-called co-conspirator was  
16 aware of all the conspiracy details. Nor must it be shown  
17 that each participant in the conspiracy had contact with all  
18 the other participants joined in the conspiracy at the same  
19 time or knew who all the participants were or what the other  
20 participants were doing or why. Moreover, a defendant may be  
21 convicted as a co-conspirator, even though he may have played  
22 only a minor part in the conspiracy.

23           What the government must proof beyond a reasonable  
24 doubt, in order to establish proof that a conspiracy existed,  
25 is that the members in some way or manner or through some

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1 method positively or silently came to a mutual understanding  
2 to attempt to perform a common and unlawful plan, which, as  
3 to Count 1, is the distribution or possession with intent to  
4 distribute marijuana.

5           In determining whether a conspiracy existed, you  
6 may consider all the evidence about the conduct, acts,  
7 statements of the alleged conspirators. You should consider  
8 not only what was said or done, but also how it was said or  
9 done. Because a conspiracy by its very nature is  
10 characterized by secrecy, you infer its existence from the  
11 circumstances of this case and conduct of the parties  
12 involved, as you find those circumstances and conduct to be  
13 from your evaluation of the evidence. Okay, as you view  
14 everything.

15           If you find that the defendant was aware to a high  
16 probability that a conspiracy existed to distribute or to  
17 possess with intent to distribute marijuana, and that he  
18 acted with deliberate disregard of the facts, you may find  
19 that he acted knowingly. However, if you find that he  
20 actually believed that the actions he was taking were  
21 legitimate, you may not find him guilty of the charged  
22 conspiracy.

23           In this connection, if you find that the defendant  
24 did not act with the reckless intent but, instead, acted in  
25 good faith belief that he was doing nothing wrong, then that

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1 is a defense to each charge of the conspiracy in this case.  
2 An honest mistake in judgment is not a crime. The burden of  
3 establishing a lack of good faith and criminal intent rests  
4 on the prosecution or the government. A defendant is under  
5 no burden to prove his good faith. Rather, the prosecution  
6 must prove that the defendant acted knowingly and willfully  
7 beyond a reasonable doubt.

8 Second element.

9 I now turn to the second element -- that is that  
10 the defendant willfully became a member of the conspiracy.

11 One may become a member of a conspiracy without  
12 having full knowledge of all the details of the conspiracy.  
13 On the other hand, a person who has no knowledge of a  
14 conspiracy but who happens to act in a way that furthers some  
15 object or purpose of the conspiracy does not there by become  
16 a conspirator.

17 Before you may find the defendant became a member  
18 of the marijuana conspiracy charged in Count 1, the evidence  
19 must show beyond a reasonable doubt that he willfully  
20 participated in the unlawful plan with the intent to advance  
21 or further some object or purpose of the conspiracy. Before  
22 you can find that he acted intentionally, you must be  
23 satisfied beyond a reasonable doubt that he acted  
24 deliberately and purposely. That is, his acts must have been  
25 the product of his conscious objective rather than the

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1 product of a mistake or accident.

2 Please recall that to act or participate willfully  
3 means to act or participate voluntarily and intentionally and  
4 with the specific intent to do something the law forbids or  
5 with the specific intent to fail to do something the law  
6 requires to be done.

7 If a defendant, with an understanding of the  
8 unlawful character of the plan, knowingly encourages, advises  
9 or assists for the purposes of furthering the plan, or  
10 scheme, he there becomes -- thereby becomes a willful  
11 participant, a conspirator.

12 In determining whether the defendant willfully  
13 became a member of the conspiracy, you should consider his  
14 acts and statements only -- you shall consider his acts and  
15 statement only. This is in contrast to the instruction I  
16 gave you on proof of the first element -- existence of the  
17 conspiracy -- which permits you consider the acts and  
18 statements of all the alleged conspirators in determining the  
19 existence of the conspiracy. Merely associating with others  
20 and discussing common goals, mere similarity of conduct  
21 between or among such persons, merely being present at the  
22 place a crime takes place or is discussed or even knowing  
23 about criminal conduct does not of itself make someone a  
24 member of a conspiracy as a conspirator.

25 However, the extent of a defendant's participation

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1 has no bearing on the issue of his guilt. A conspirator's  
2 liability is not measured by the extent or duration of his  
3 participation. Indeed, each member may perform separate and  
4 distinct acts and may perform them at different times. Some  
5 conspirators play major roles, while others play minor roles  
6 in the scheme. An equal role is not what the law requires.

7 In determining whether a defendant knowingly and  
8 intentionally formed or joined the charged conspiracy, you  
9 should consider all the evidence including whether the amount  
10 of marijuana involved in transactions and the circumstances  
11 surrounding such transactions support the conclusion that the  
12 marijuana was intended for resale, whether there was  
13 prolonged cooperation between the parties, and whether there  
14 was a level of mutual trust or standardized dealings. While  
15 no single factor is controlling, you should consider all the  
16 evidence in deciding whether the facts support the inference  
17 that the transactions were entered into with an awareness of  
18 the charged conspiracy and whether there are facts from which  
19 you can infer an ongoing relationship with the charged  
20 conspiracy.

21 The third element.

22 The indictment charges that the defendant conspired  
23 to distribute or possess with intent to distribute marijuana.  
24 The knowing and intentional distribution of marijuana  
25 violates the law and the knowing and intentional possession

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1 of marijuana with intent to distribute it violates the law.

2           The word "distribute" means to deliver marijuana.  
3 "Deliver" is defined as the actual constructive or attempted  
4 transfer of marijuana. Simply stated, the words "distribute"  
5 and "deliver" mean to pass on or to hand over to another or  
6 to cause to be passed on or handed over to another or to try  
7 to pass on or hand over to another marijuana.

8           Distribution does not require a sale. Activities  
9 in furtherance of the ultimate sale, such as vouching for the  
10 quality of the marijuana, negotiating for or receiving the  
11 price, or supplying or delivering the marijuana may  
12 constitute distribution. In short, distribution requires a  
13 concrete involvement in the transfer of the marijuana.

14           In summary, if you find beyond a reasonable doubt  
15 that the conspiracy involved the distribution of marijuana or  
16 possession with intent to distribute marijuana, then the  
17 third element has been proven.

18           Quantity of the marijuana involved.

19           If you determine that the alleged conspiracy to  
20 distribute or possess with intent to distribute marijuana  
21 existed and that the defendant was a member of the  
22 conspiracy, you must determine the total amount of the  
23 marijuana involved in the conspiracy. In this regard, the  
24 government must proof beyond a reasonable doubt the quantity  
25 of the marijuana involved.

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1           The government bears the burden of proving beyond a  
2 reasonable doubt that the conspirators intended to possess  
3 with intent to distribute, or to distribute, the amount of  
4 illegal drugs charged in the indictment or some lesser  
5 amount. The amount of marijuana involved in the conspiracy  
6 includes not only the quantity that the members of the  
7 conspiracy actually distributed or possessed with intent to  
8 distribute, but also the quantity that they conspired or  
9 agreed to distribute or possess with intent to distribute.  
10 In other words, you should consider the quantity that the  
11 members of the conspiracy intended to distribute. An  
12 agreement to distribute or to possess with intent to  
13 distribute a specific amount of an illegal drug, evidences an  
14 intent to distribute it.

15           Once you have determined the total quantity of  
16 marijuana, if any, involved in the conspiracy, you must  
17 decide the quantity attributable to the defendant. In  
18 essence, you must make a determination as to the amount of  
19 marijuana he knew or reasonably could have foreseen as being  
20 involved in the conspiracy.

21           A defendant is responsible for not only his own  
22 actions but also for those of his co-conspirators, if those  
23 actions were known or were reasonable foreseeable to him, if  
24 they were in furtherance of the conspiracy. If you have  
25 found, beyond a reasonable doubt, the defendant was a

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1 participant in the conspiracy charged in the indictment, he  
2 may be liable for any drug quantities his co-conspirators  
3 conspired to distribute or possess with intent to distribute.

4 Before holding defendant liable for agreements made  
5 or acts done by his co-conspirators, however, you must also  
6 find that such agreements or acts were known or were  
7 reasonably foreseeable to him. In other words, they must  
8 fall within the scope of the agreement between he and the  
9 other co-conspirators.

10 Your determination as to the quantity of marijuana  
11 attributable to the defendant should, therefore, include any  
12 amount you find beyond a reasonable doubt that he himself  
13 conspired to distribute or possess with intent to distribute.  
14 It should also include any known or reasonably foreseeable  
15 amount that you find beyond a reasonable doubt that the  
16 defendant and his co-conspirators, in furtherance of the  
17 conspiracy, conspired to distribute or possess with intent to  
18 distribute.

19 I will provide a verdict sheet with three ranges of  
20 drug amounts that you may consider if you find defendant  
21 guilty of Count 1.

22 Now, in conclusion.

23 I have now outlined the rules of law applicable to  
24 this case and the process by which you should weigh the  
25 evidence and determine the facts. In a few minutes, you will

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1 retire to the jury room for your deliberations. Your first  
2 order of business in the jury room will be to elect a  
3 foreperson. The foreperson's responsibility is to insure  
4 that deliberations proceed in an orderly manner. This does  
5 not mean that the foreperson's vote is entitled to any  
6 greater weight than the vote of any other juror.

7           When you are in the jury room, listen to each other  
8 and discuss the evidence and the issues. You will have at  
9 your disposal all of the exhibits that have been received  
10 into evidence. It is the duty of each of you as jurors to  
11 consult with each other. You must deliberate with a view to  
12 reaching an agreement, but only if you can do so without  
13 violating your individual judgment and conscience. Your job  
14 as jurors is to reach a fair conclusion from the law and the  
15 evidence. The defendant, the government and the Court are  
16 relying on you to give full and conscientious consideration  
17 to the issues and the evidence before you.

18           In order to return a verdict, it is necessary that  
19 each juror agree. Your verdict must be unanimous.

20           As you know, I've permitted you to take notes  
21 during the trial. As I explained during my preliminary  
22 instructions to you, those notes are simply an aid to your  
23 memory because the notes may be inaccurate or incomplete.  
24 They may not be given any greater weight or influence than  
25 the recollections of other jurors about the facts or the

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1 conclusions to be drawn from the facts in determining the  
2 outcome of this case. You may base your determination on the  
3 facts and, ultimately, your verdict on the court record,  
4 rather than on any juror's notes.

5 Having said that, if, in the course of your  
6 deliberations, your recollection of any part of the testimony  
7 should fail or if you should find yourself in doubt  
8 concerning my instructions, it is your privilege to return to  
9 this courtroom to have the testimony read to you or my  
10 instructions further explained. Please remember that it is  
11 not always easy to locate what portion of the testimony you  
12 might want. So be specific as you possibly can in requiring  
13 the portion or portions of the testimony that you may want in  
14 requesting those portions. In addition, I caution you that  
15 reading back of testimony may take some time and effort. You  
16 should, therefore, make a conscientious effort to resolve any  
17 questions as to the testimony through your collective  
18 recollections first.

19 Should you desire to communicate with the Court  
20 during your deliberations, please put your message or  
21 question in writing. The foreperson should sign the note and  
22 pass it to the Marshal who will bring it to my attention. I  
23 will then respond, either in writing or orally, by having you  
24 return to the courtroom. However, do not tell me or anyone  
25 else how the jury stands on the issue of defendant's guilt

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1 until a unanimous verdict is reached. In other words, if  
2 you're voting in there, any note or something that comes out  
3 should have no numbers or any indication of where people  
4 stand or what that vote might be until you've reached a your  
5 unanimous verdict.

6 As far as any notes, whoever has the best  
7 handwriting -- wouldn't be me -- but whoever in there. The  
8 foreperson just needs to sign it, put the date and the time  
9 that the note's being sent out and there's forms that we will  
10 give you for this stuff.

11 During your deliberations do not hesitate to  
12 re-examine your views and change your mind. Do not, however,  
13 surrender your honest convictions because of the opinion of a  
14 fellow juror or for the purposes of returning a verdict --  
15 just for returning a verdict. Remember, you are not  
16 partisans. You are judges, judges of the facts. Your duty  
17 is to seek the truth from the evidence presented to you while  
18 holding the government to its burden of proof.

19 Once you have reached a unanimous verdict, your  
20 foreperson should fill in the verdict form, date it, sign it  
21 and inform the Marshal that a verdict has been reached. A  
22 verdict form has been prepared for you and I will now review  
23 it with you. And it's very straightforward and simple.  
24 You'll be provided with this, as well.

25 It says, it has the caption of the case and it

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1 says: "As to Count 1 of the indictment (charging the  
2 defendant with conspiracy to knowingly distribute, or to  
3 possess with the intent to distribute, a controlled  
4 substance, in violation of 21, U.S.C., Section 846), how do  
5 you find the defendant? Guilty or not guilty?

6 If your answer is guilty, proceed to question two.  
7 If your answer is nothing, you have finished your  
8 deliberations.

9 Question two, "If and only if you find the  
10 defendant guilty of participating in the conspiracy charged  
11 in Count 1, what do you find the quantity of marijuana to be  
12 (for which you find that he is responsible with regard to  
13 that count) beyond a reasonable doubt? And it has a thousand  
14 kilograms or more? Yes or no. A hundred kilograms or more  
15 but less than a thousand kilograms? Yes or no. Less than a  
16 hundred kilograms? Yes or no.

17 And it just has a place, the date or the date and  
18 you put the foreperson to sign the verdict form and that's  
19 it.

20 And that's going to conclude my instructions can I  
21 answer any questions for anybody at this point?

22 (Jurors nodding no.)

23 THE COURT: This will all be sent in for you. All  
24 right we're going to swear in some court security officers,  
25 please. We're going to need somebody for the alternates, as

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1 well.

2 (Marshals duly sworn.)

3 THE COURT: Okay. Ladies and gentlemen, we're  
4 going to have the 12 jurors retire to the jury room to start  
5 your deliberations. The two alternates will be taken to  
6 another location where you'll be kept for a period of time  
7 until we decide that either there's -- we don't need your  
8 service any longer or that until there's a verdict. Usually  
9 we keep you around until there's a verdict, just in case.  
10 That way you get to know what happens, too. But you'll be  
11 kept in a separate room and you won't be able to participate  
12 in these deliberations, unless and until it should become  
13 necessary. Okay.

14 That being said, you can return to the jury room  
15 and start your deliberations and enjoy your lunch.

16 (Jury excused to deliberate, 11:43 a.m.)

17 THE COURT: Okay, the jury has retired to start  
18 their deliberations. Are there any objections or requests  
19 for with regards to the charge for the government?

20 MR. GARDNER: No, sir.

21 THE COURT: For the defense, Mr. Sacco?

22 MR. SACCO: No, your Honor.

23 THE COURT: Okay, very well. I'm going to ask you  
24 if you're going to be away from the immediate area of the  
25 courtroom off this floor, that you leave a cell number, a way

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1 that we can get you as quickly as possible with my courtroom  
2 deputy Lori so that we can receive -- get you back here for  
3 any notes that we may receive expeditiously.

4 That being said, once you do that, I want to thank  
5 counsel in this case. You're gentlemen. You proceeded as  
6 gentlemen. You stipulated where you could. The Court  
7 appreciates the way that you've tried this case. Your  
8 performance in the case I thought was outstanding, both of  
9 you, and, certainly, your demeanor and courtesies to this  
10 Court are very much appreciated. Thank you, whatever  
11 happens.

12 MR. GARDNER: Thank you.

13 MR. SACCO: Thank you, sir.

14 (Recess, 11:47 a.m.)

15 (Open court, 2:32 p.m.)

16 THE COURT: Okay. The record should reflect we're  
17 in the courtroom without the jury. We've received a note  
18 that the jury has reached a verdict. So we're going to bring  
19 this jury in and we're going to take that verdict. When  
20 they're ready.

21 (Jury present, 2:33 p.m.)

22 THE COURT: Okay, ladies and gentlemen, we've  
23 received your note that you've reached a verdict. I'm going  
24 to ask the foreperson if you'll please stand and I'm going to  
25 have my clerk take the verdict.

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1           THE CLERK: In the case of United States of America  
2 versus Allan Peters, 8:13-CR-316, number one, as to Count 1  
3 of the indictment charging defendant with conspiracy to  
4 knowingly distribute or to possess with intent to distribute  
5 a controlled substance, in violation of Title 21, United  
6 States Code, Section 846, how do you find the defendant?  
7 Guilty or not guilty?

8           THE FOREPERSON: Guilty.

9           THE COURT: Number two, if, and only if, you find  
10 the defendant guilty of participating in the conspiracy  
11 charged in Count 1, what do you find the quantity of  
12 marijuana to be for which you find that he is responsible  
13 with regard to that count beyond a reasonable doubt? One  
14 thousand kilograms or more? Yes or no?

15           THE FOREPERSON: Yes.

16           THE CLERK: Thank you.

17           THE COURT: Okay. Would either the government or  
18 the defense like this jury polled.

19           MR. GARDNER: No, sir.

20           MR. SACCO: Yes, your Honor, please poll the jury.

21           THE COURT: I'm now going to ask each of you if the  
22 verdict that was read by your foreperson is the verdict of  
23 each of you individually.

24           With regard to the guilty verdict of number one and  
25 the amount of 1,000 kilograms or more, juror number one, is

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1 that your verdict?

2 A Yes.

3 Q Juror number two?

4 A Yes.

5 THE CLERK: Juror number three.

6 A Yes.

7 Q Juror four?

8 A Yes.

9 Q Five?

10 A Yes.

11 THE CLERK: Juror number six?

12 A Yes.

13 THE CLERK: Juror number seven?

14 A Yes.

15 THE CLERK: Juror number eight?

16 A Yes.

17 THE CLERK: Juror number nine?

18 A Yes.

19 THE CLERK: Juror number ten?

20 A Yes.

21 THE CLERK: Juror number 11?

22 A Yes.

23 THE CLERK: Juror number 12?

24 A Yes.

25 THE CLERK: Thank you.

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1           THE COURT: I've received and accept the verdict of  
2 this jury. I'm going to direct the clerk of the court to  
3 file and record the verdict.

4           Ladies and gentlemen of the jury, on behalf of this  
5 court, the attorneys the defendant, the government, I want to  
6 thank you for your time and attention to this case. These  
7 attorneys, as you might imagine, work very hard in preparing  
8 and getting ready and it was very apparent to me that you  
9 were attentive and paid close attention. So, on behalf of  
10 the attorneys, as well as the court, I thank you.

11           I always dismiss juries personally from the jury  
12 room. So I'm going to ask you to return to the jury room. I  
13 just have a couple of things that I need to cover with the  
14 attorneys and then I'll be in to excuse you from your  
15 service. So you can retire to the jury room at this point,  
16 thank you.

17           (Jury excused, 2:36 p.m.)

18           THE COURT: Okay, my courtroom deputy will return  
19 all the original exhibits to the counsel, whoever presented  
20 them and it will be your responsibility to provide those  
21 exhibits to the court of appeals with anything that may be  
22 filed, any requests for exhibits. It's your responsibility  
23 to maintain them and have them available, should there be an  
24 appeal.

25           I'm going to direct the probation department to

US V. Peters - 13-CR-316

1 prepare and submit a presentence report and I'm going set  
2 sentencing for this case for July 10th, 2014, and we'll do it  
3 in Albany, New York at the courthouse there.

4 Counsel, the clerk will electronically file the  
5 Northern District uniform presentence record, once the  
6 presentence report is prepared. Any objections to the report  
7 must be submitted in writing to the probation department  
8 within 14 days of receipt of that report.

9 Now there's some appellate rules that I need to  
10 advise you of and I'll just do that quickly. Pursuant to  
11 Rule 29(c), a motion for judgment of acquittal after  
12 discharging the jury, must be filed within 14 days after the  
13 jury is discharged or within such further time as the Court  
14 may fix during the 14-day period.

15 Under Rule 33, a motion for a new trial, a motion  
16 for a new trial based on the grounds of newly discovered may  
17 be made only within the three years after the. But if an  
18 appeal is pending, the Court may grant the motion only on  
19 remand for the case. Motion for a new trial based on any  
20 other grounds shall be made within 14 days after the verdict  
21 or filing of guilty or such time as the Court may fix during  
22 the 14-day period.

23 Appellate Rule 4(b), with criminal cases notice of  
24 appeal must be filed within 14 days after entry of the  
25 judgment.

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1           Rule 46(c), regarding release from custody pending  
2 sentence or notice of appeal, I would just do it pending  
3 sentence or notice of appeal, and expiration of time for  
4 filing that motion shall be in accordance with 18, U.S.C,  
5 section 3142. The burden of establishing the defendant will  
6 not flee or pose a danger to any other person or to the  
7 community rests with the defendant.

8           And that completes the appellate rules that need to  
9 be followed, should there be any motions with regard to those  
10 areas, statutory areas.

11           Mr. Gardner, anything further on behalf of the  
12 government?

13           MR. GARDNER: Your Honor, the government will file  
14 a preliminarily order of forfeiture in the next I believe 10  
15 days or 14 days with regard to the money judgment in the case  
16 and other than that, no, your Honor.

17           THE COURT: Mr. Sacco.

18           MR. SACCO: Nothing further, Judge.

19           THE COURT: Thank you, gentlemen.

20           MR. SACCO: Thank you.

21           MR. GARDNER: Thank you.

22           MR. SACCO: Your Honor, my client just asked me if  
23 there's any chance he can be sent back to the Clinton County  
24 jail because that's closer to his family and his child. He  
25 asked me to ask you.

US V. Peters - 13-CR-316

1           THE COURT: Mr. Peters, I don't have control of  
2 that. I can certainly, if the Marshals -- it's all on space  
3 and availability -- so if they have space up there, you know,  
4 yeah, I can ask them to send you back up there. I'm asking  
5 them to do that, if there's space, and they can get you back  
6 up there, that's fine. But it really depends on their work  
7 load, their space, when they can transport, all that sort of  
8 stuff. So, I don't control those situations.

9           THE DEFENDANT: Okay.

10          THE COURT: That's completely up to the Marshals  
11 but I'm sure if there's some possibility for them to get you  
12 back up, they're usually pretty good about those things.  
13 They'll do that for you, if they can, okay, sir.

14          THE DEFENDANT: Yes.

15          THE COURT: We'll see you in July.

16          THE CLERK: Court's adjourned.

17          (Proceedings adjourned, 2:40 p.m.)  
18  
19  
20  
21  
22  
23  
24  
25

JA-731

695

US V. Peters - 13-CR-316

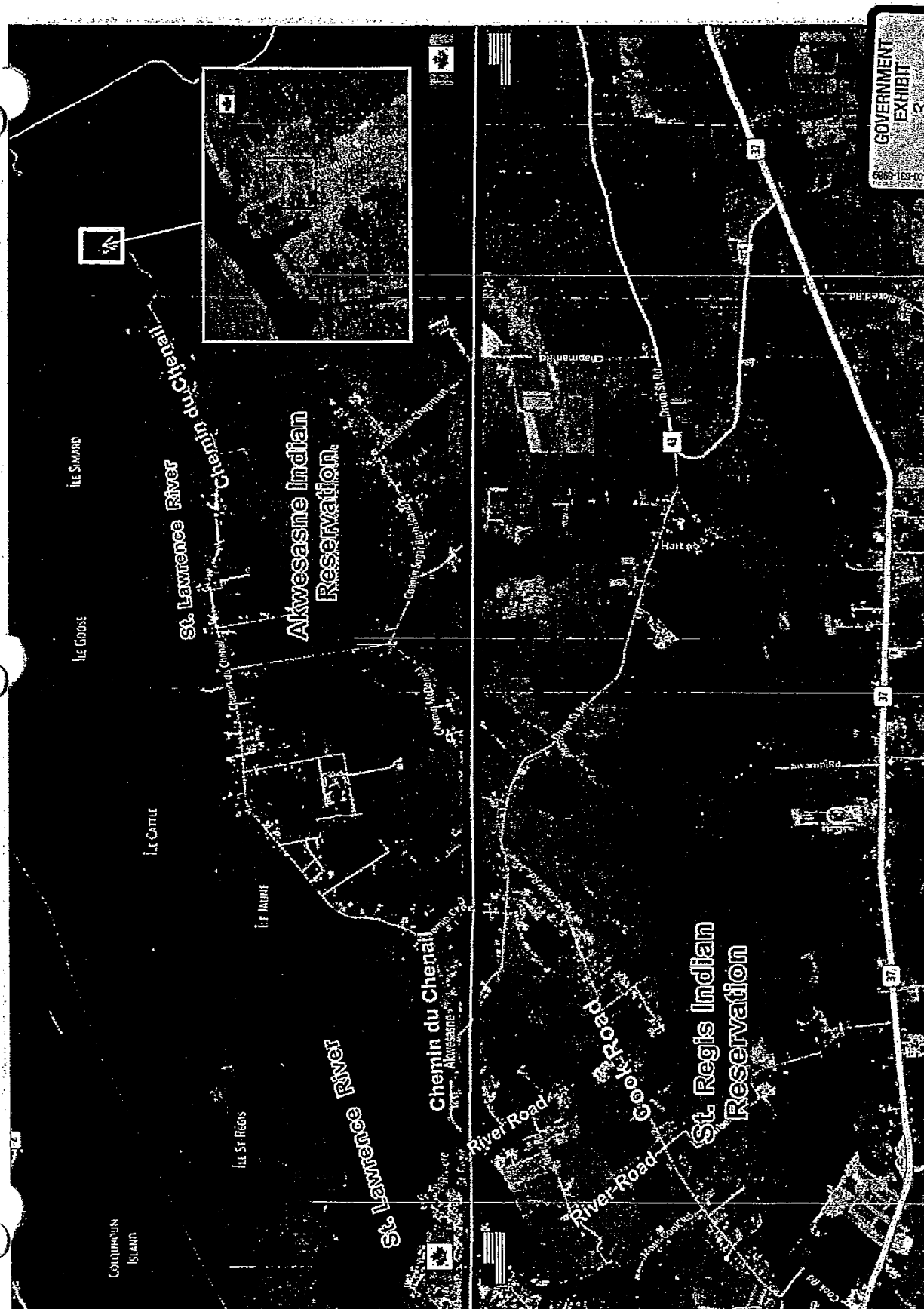
C E R T I F I C A T I O N

I, DIANE S. MARTENS, Registered Professional  
Reporter, DO HEREBY CERTIFY that I attended the foregoing  
proceedings, took stenographic notes of the same, that  
the foregoing is a true and correct copy of same and the  
whole thereof.

---

DIANE S. MARTENS, FCRR

JA-732



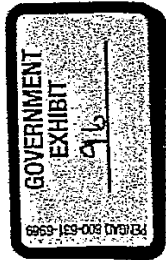
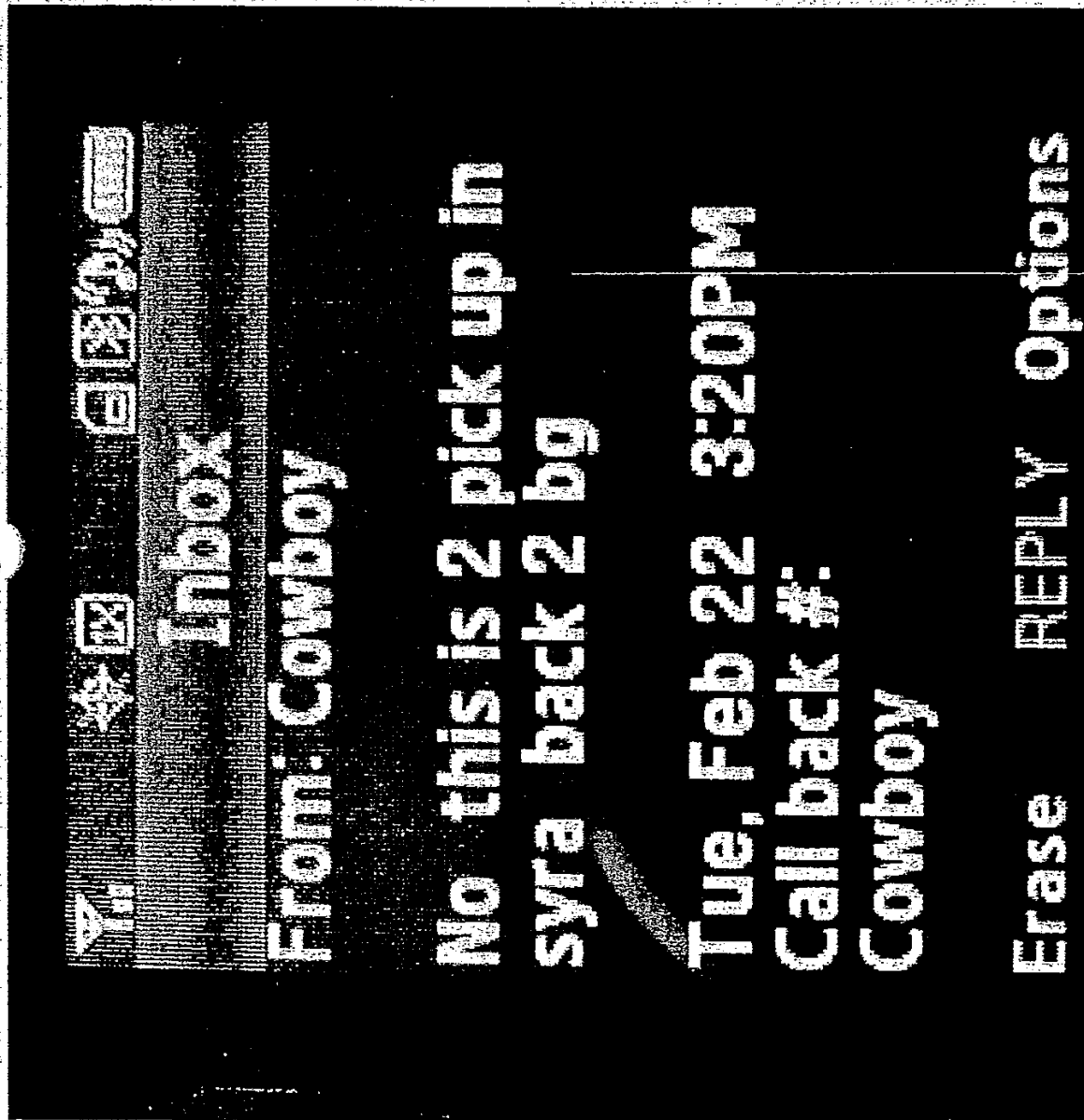
JA-733



From: C  
Lunch 2moro bg?  
CB:  
518-729-8964  
Oct 28, 5:56 pm

Eraser REPLY Options

JA-734



JA-735



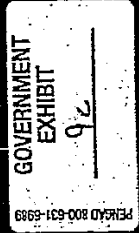
## Inbox

**From: Cowboy**

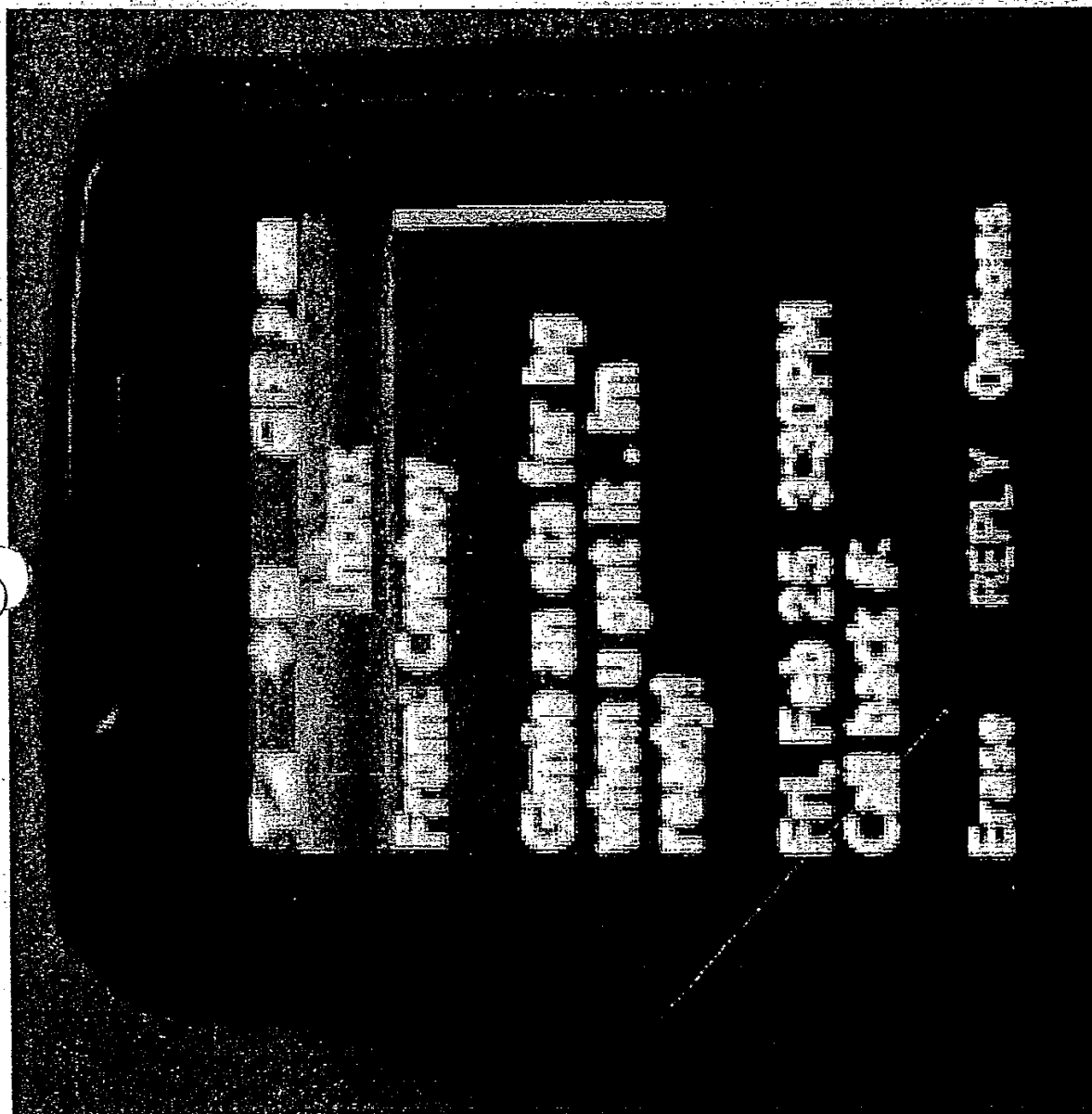
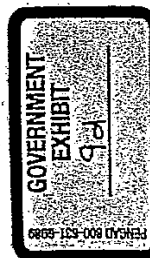
**No.& its those hand  
tools**

**Tue, Feb 22 3:28PM  
Call back #:  
Cowboy**

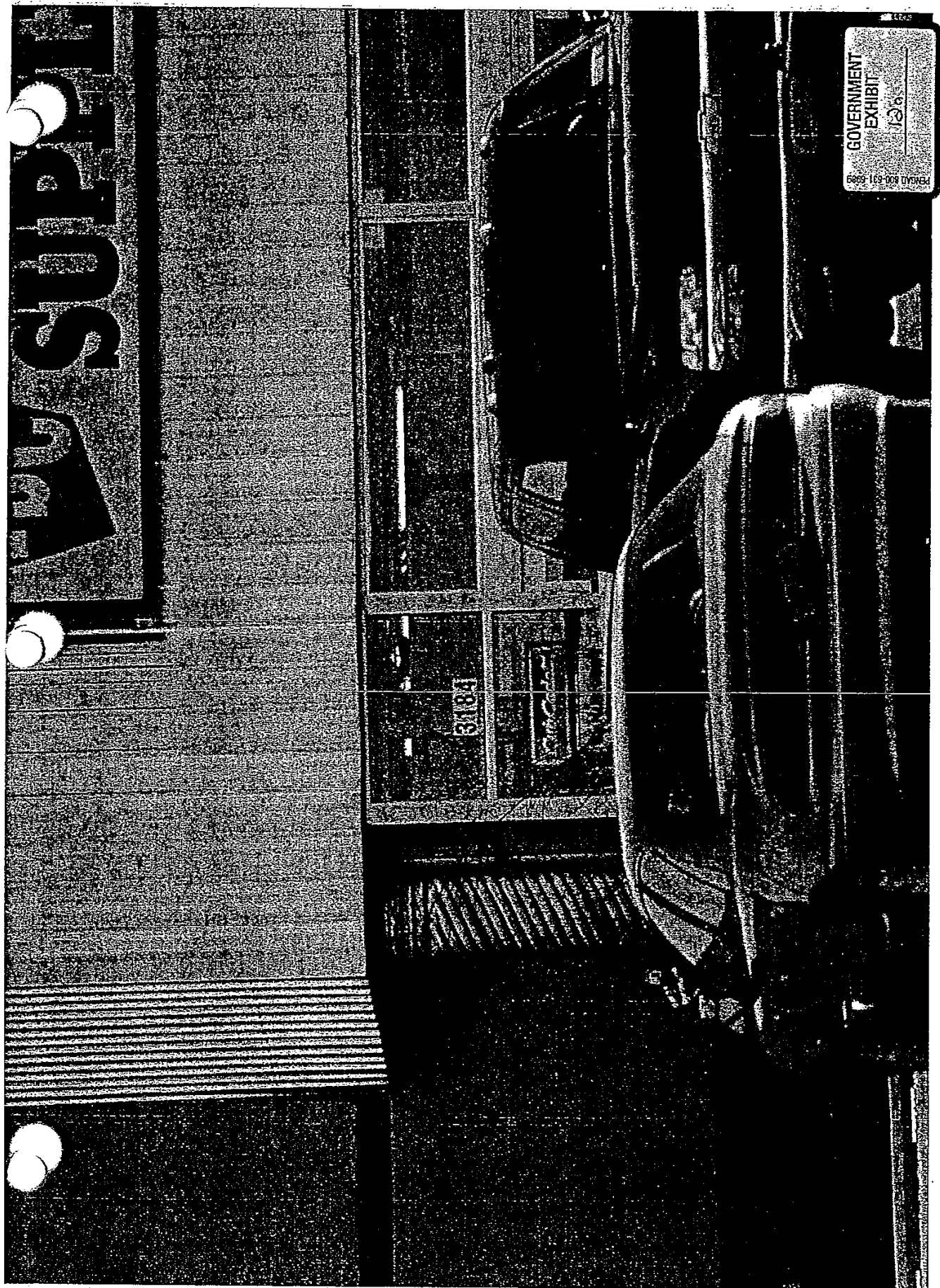
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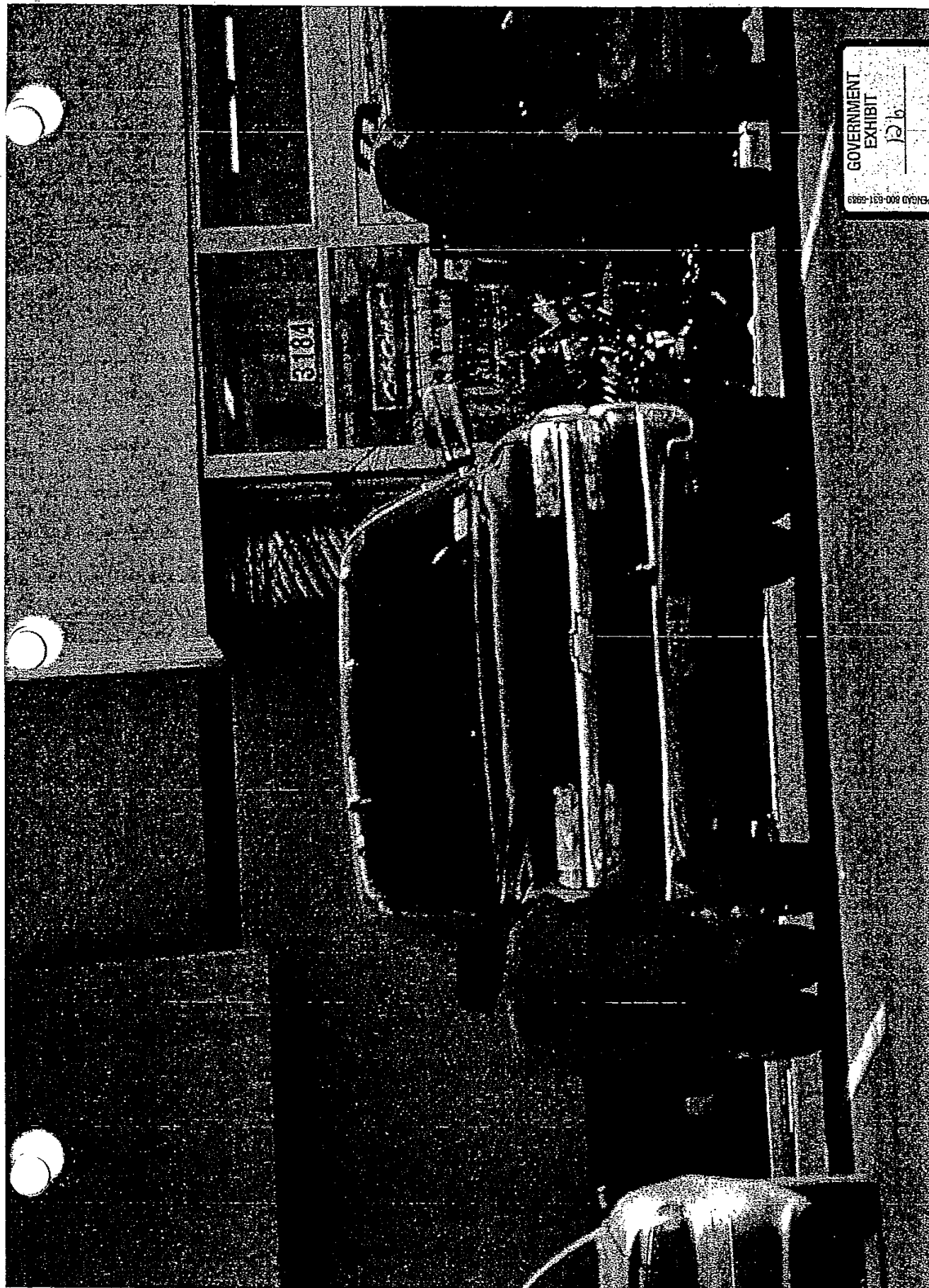
JA-736



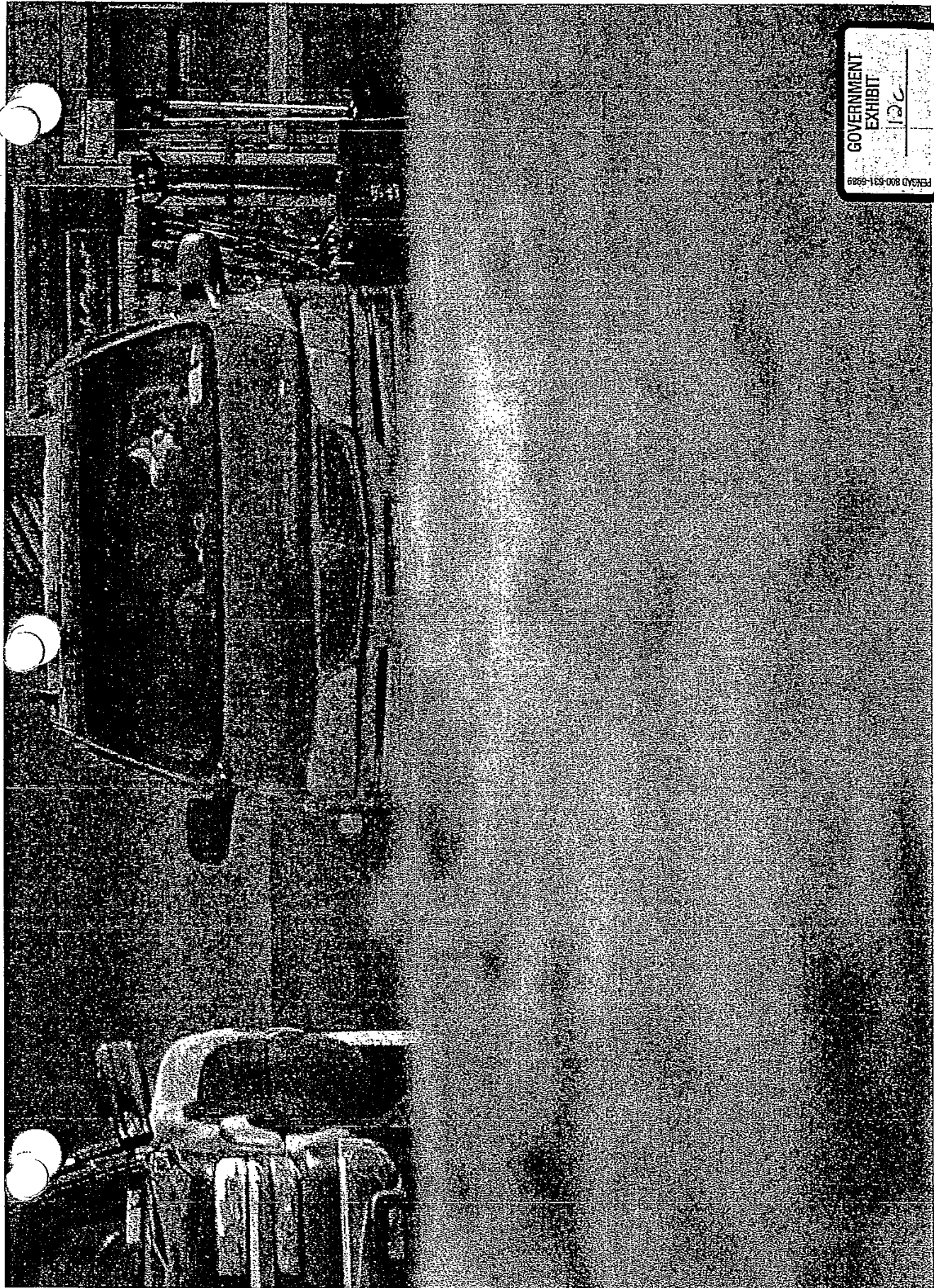
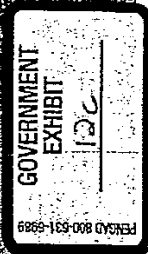
JA-737



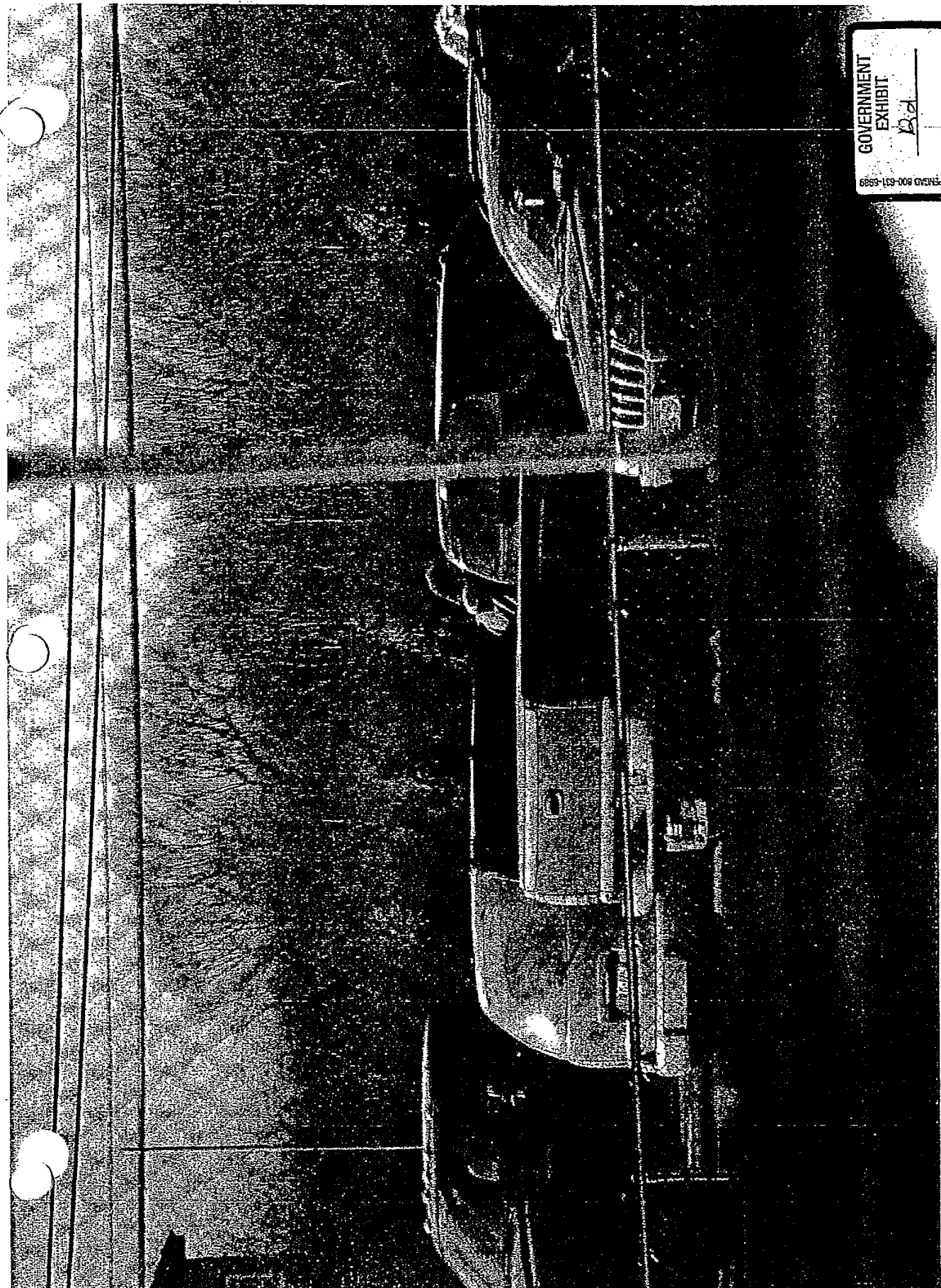
JA-738



JA-739



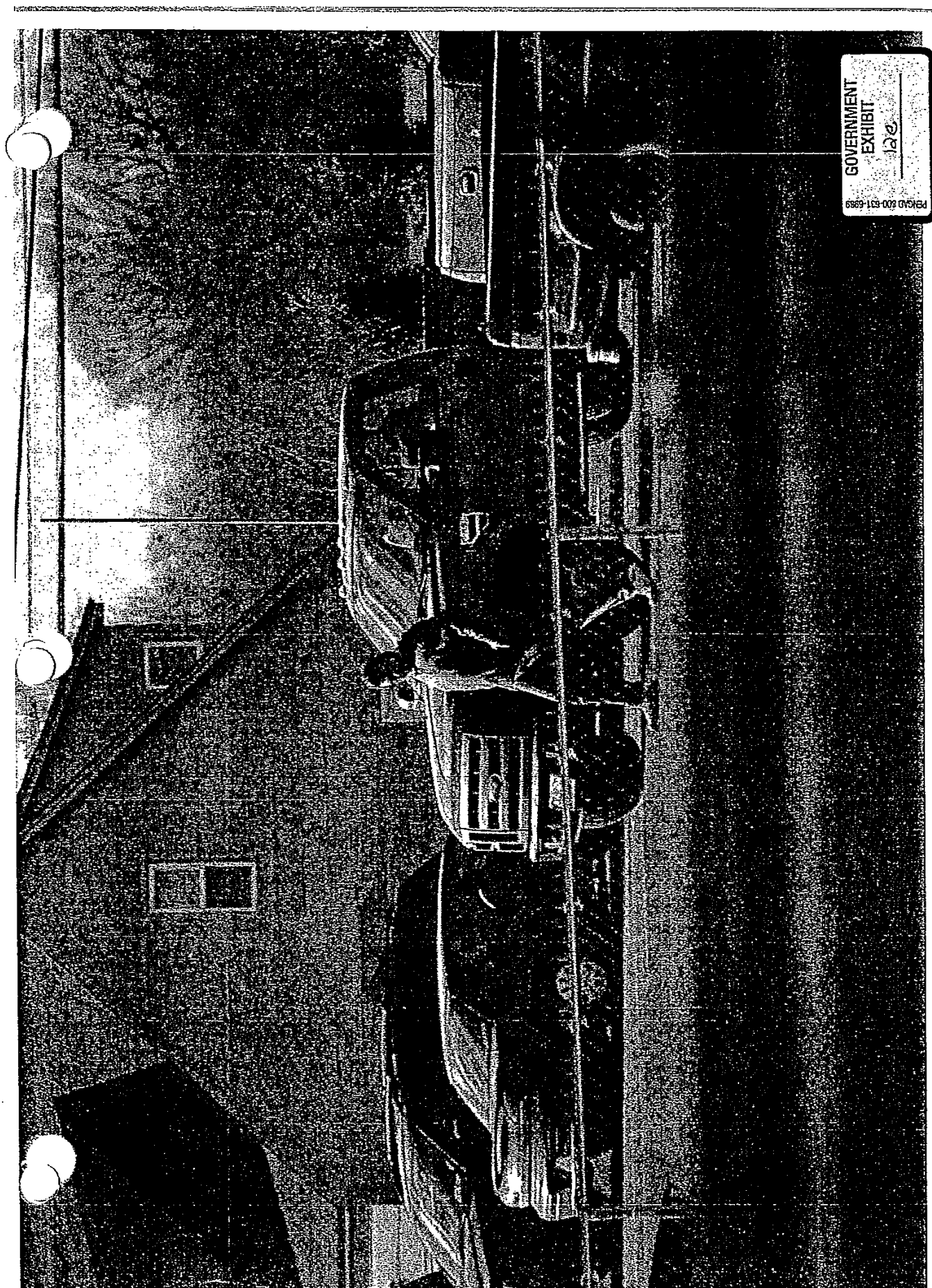
JA-740



GOVERNMENT  
EXHIBIT

FBI  
FEDERAL BUREAU OF INVESTIGATION  
U.S. DEPARTMENT OF JUSTICE  
WASHINGTON, D.C. 20535  
8889 800-631-6989

JA-741



JA-742

GENL. 15 REV. 4/85 NYSRP RECEIPT AND RELEASE OF PROPERTY				NEW YORK STATE POLICE RECEIPT	
May be handwritten. Original to Division Headquarters. First carbon copy to Evidence Custodian, if required.				CASE NUMBER	RCN
GROUP	STATION	DATE	MEMBER'S NAME		
D	CNGT	02/25/11	Trpr. James Smith		
DESCRIPTION OF PROPERTY					
James - 9mm PT209 - TIDP07265					
Springfield Armory - 9mm US894741					
James - 9mm PT99AF - TIK 05657					
Davis Ind. 380 cal AP477247					
Keller #9 9mm - RA204					
AA Arms AP9 9mm 035924					
Star - Ultra Star 9mm - 2426752					
Gilcock 26-7mm BPU 97045					
Gilcock 23 - .40 caliber KLF050					
James Millennium .45 caliber NC026368					
James PT24/7 .40 caliber SLD10543					
1 Walther P22 .22 caliber L038287					
Springfield Armory .45 ACP US751281					
Smith + Wesson 9mm DT53098					
Smith + Wesson 9mm DU06065					
Smith + Wesson Revolver 978762					
* Miscellaneous gun supplies, magazines, box.					
VEHICLE:	YEAR	MAKE	MODEL	STYLE	COLOR
	VIN NUMBER			PLATE NUMBER	REGISTRATION STATE
This is a fake receipt generated by DEA. This receipt has not been released.					
UNDER PENALTY OF PERJURY, I, <u>James Smith</u> agent of owner,					
HEREBY IDENTIFY THE PROPERTY DESCRIBED ABOVE AS THE PROPERTY BELONGING TO 'me' AND HAVING REQUESTED ITS RETURN, HEREBY ACKNOWLEDGE RECEIPT OF SUCH PROPERTY WHICH IS DELIVERED INTO MY POSSESSION BY A POLICE OFFICER AND MEMBER OF THE NEW YORK STATE POLICE ON THE _____ DAY OF _____ 20____ AT _____ N.Y. I DO HEREBY RELEASE AND FOREVER DISCHARGE SAID POLICE OFFICER, THE NEW YORK STATE POLICE, AND ANY AND ALL PERSONS WHO HAVE HAD SUCH PROPERTY IN THEIR CUSTODY OR UNDER THEIR CONTROL BY REASON OF ANY PROCEEDING OR ACTION TAKEN BY THEM FOR ITS PRESERVATION TO ITS RETURN TO 'me' the owner, OF AND FROM ALL, AND ALL MANNER OF ACTION AND ACTIONS, CAUSE, AND CAUSES OF ACTION, SUITS, DEBTS, SUMS OF MONEY, ACCOUNTS, DAMAGES OR CLAIMS OF ANY NATURE WHATSOEVER.					
DATED AT _____, N.Y. _____ 20____					
WITNESS			OWNER / AGENT OF OWNER		



\*CROSS OUT WHICHEVER DOES NOT APPLY

JA-743

Call: 001

DATE: 3/25/2011

TIME: 4:21 pm

PETERS: Allan Peters

FORGET: Alain Forget

PETERS: Hello.

FORGET: Hey there big guy, what's going?

PETERS: Ah not much, gettin' ready to head up that way  
there in a little bit.

FORGET: Are ya?

PETERS: Ya, where do you want to meet?

FORGET: Cool Cool. Um, I don't care. Burger King Parking  
lot?

PETERS: Ya, give me half an hour, I'll be there.

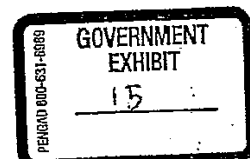
FORGET: Half an hour?

PETERS: Yup.

FORGET: Sounds good.

PETERS: Ok bye.

FORGET: Thanks bud.



JA-744

Call: 001

DATE: 3/25/2011

TIME: 4:40 pm

PETERS: Allan Peters

FORGET: Alain Forget

(16:56)

FORGET: You want to hop in here or you want me out?

PETERS: I'll go over there, I don't think you're going to  
hop around too quickly.

FORGET: It's kind of slow with this shit bud.

FORGET: Yeah, you're a little big to be sitting in here.

PETERS: This ain't bad.

FORGET: How's it going dude?

PETERS: Not bad. You?

FORGET: Oh, Could be better. Look at my, I'm still black.

PETERS: Jesus Christ.

FORGET: Like that's nothing, it goes like from my foot  
right to my hip.

PETERS: They said you woke up one morning and your leg was  
just black. Scare the hell out of you?

FORGET: Dude, like it was turning black, but like within a  
few days after I didn't feel good anymore and, I don't  
know, just I was kind of getting short of breath I was in  
nasty pain. The pain. They say I have a blood clot at  
first the size of a softball, right here and like see that  
lump?

(17:56 skip to 20:37)



JA-745

PETERS: So what's going on with the farmer you said?

FORGET: Well, he wanted, I, we're, tryin, I told him, I was like, we need work man, I gotta make some cash here. Them guys owe me some money yet and, he says, they're not wantin' to pay cause there's no paperwork. And I'm like, well, well what do you want me to do go claim this fucking shit? Ya know, I can't, I'm not going to walk in and claim anything when they didn't fuckin' catch me with anything.

PETERS: Mm Hmm.

FORGET: They're obviously; they must have found somethin' because they put in the newspaper if anybody's has seen discarded anything out of a vehicle, to call in with information. And I told him, I was like, I'm not going to claim this.

PETERS: Mm hmm.

FORGET: By all fuckin' means, I've already lost my truck ya know. Am I going to get it back? I don't know regardless, was like, ya know, 'we need to make some cash' and he's like, 'I agree I need cash too.' So, I was like, well can we move some weed or whatever. And, I guess he had couple of things maybe we could have moved to Vermont, and I think some Boston and what not, then he hits me up with these fuckin', fuckin' guns which I really don't like movin' shit like that, ya know. I've never done it I told him, I don't, I, whatever.

PETERS: They've just been busting people too on the rez.

FORGET: Really?

JA-746

PETERS: The guy got, one guy with a couple guns there,  
they say he's look at fuckin' five years.

FORGET: Well, this is fucked up because, I, I called him.  
Like, the guy, we had that nasty snow storm.

PETERS: Mm hmm.

FORGET: And, he was trying, he got there, all went down  
good, and he leaves, and within no time, he realizes he's  
being foll, he thinks he's being followed. And the guy is  
like, straight as a whistle, clean, no-record, ya know 40,  
46, 47, Cuban guy. And ah, so he starts windin' taking  
different roads, and then he gets off the Interstate, he  
goes in, pulls in to get some gas, grabs something to eat,  
takes back off, he gets back on the Interstate. Coming  
from Syracuse, and all of a sudden he looks in the mirror,  
he's kinda got this paranoid feeling already.

PETERS: Mm hmm.

FORGET: All went, he said, probably 15-20 minutes, and  
BAM. Trooper come up out of nowhere and they yanked him  
over. I guess they were real pricks with him at first.  
And, then they, ya know, they ran him through and obviously  
saw that guy is clean and has no record or nothing. And  
were like, 'Where did you get these guns' and he had a  
legit story which worked great. He says, I have an uncle  
that passed away, and I got an inheritance. My aunt didn't  
want them, I have a clean record, I've filed for a  
concealed weapons permit already, and he said, this is it.  
So they said, well we're confiscating the guns, and they  
gave him a receipt. My wife gets this in the fuckin'

JA-747

mailbox. And, like, the last I heard from him was the day

I talked to Colin. I told him, I was like, this guy is  
freakin' now, freakin', like he's clean, but he's wonderin'  
is he gonna to prison or is he gonna, ya know, what's ,  
what's gonna happen with.

PETERS: What'd he get caught with?

FORGET: 16 or 17 fuckin' pistols. Yeah, yeah. And he  
told me there was only like 10 of 'em and he got nailed  
with 16. Ya know, so like I'm, I'm pissed, and I call him  
at this point, anyhow, they give him a receipt and they  
told him, if all checks out, don't fuckin' go nowhere,  
we'll be in touch with you, and if all checks out, you'll,  
you'll get your guns back. And he just told me on the  
phone, like he says, I'm ditchin' this phone after I get  
off the phone with you, and he says, I'm fucking gone. He  
says, I'm not fuckin' with this shit. I'm outta here. Like  
this guy was cool, like he ran, ran chronic before and what  
not ya know. Very, very, very mellow chill guy but,  
anyhow. Umm, I call him up, and I told Colin, I was like  
listen man, I don't know where this fuckin' heat come from,  
obviously one of you guys is fuckin' burnin' up. I don't  
know if it's the fuckin' guy that's in the hotel room, or  
if it's you, or whoever the hell set this shit up, but you  
need to tell that guy to get the fuck out of there from  
that hotel. Like leave, now. I don't know, I don't know  
what happened, I haven't talked to Colin since I told.  
He's like 'well these phones should be good,' I said, well  
we're not takin' that chance. I said, after I get off the

JA-748

phone with you, I'm crackin' it, you do the same. I'll get  
1 you a new one somehow. I'll get you that paperwork and he  
2 talked to my son and, he told my son, ya know, I really  
3 need to talk to your dad, I need paperwork I need  
4 something. Matt told me, I, I just can't go over there.  
5 Like, I can't go far, the meds I'm on. I walk, I'm in  
6 stupid ass pain I can't sleep half the time.

7 PETERS: What the hell is he doing now?

8 FORGET: Colin?

9 PETERS: Yeah.

10 FORGET: I don't know, I don't know.

11 PETERS: This guy with the guns, got caught over here?

12 FORGET: Yeah.

13 PETERS: What was he brinin' em here or?

14 FORGET: He was trying to get them down to your place.

15 PETERS: For?

16 FORGET: To bring them back over there. To bring them to

17 Colin. What you didn't know about it?

18 PETERS: I didn't know nothing about it.

19 FORGET: Isn't that cute.

20 PETERS: Yeah, cause, I told him, I said, I don't want

21 nothing to do with guns.

22 (25:32 - skip to 25:35)

23 FORGET: Yeah, that's, that's not, I told him this, I told

24 him on the phone I was like, dude this is not a cool

25 fuckin' issue by all means. I don't need this right now, I

26 don't need, I said, we need to make money, but I don't

27 fuckin' need this at all. Supposedly, he's like, 'we still

JA-749

owe them guys like three-hundred some thousand dollars,'  
and I was like, 'we or you.' Ya know, it wasn't, I did  
what I could. Ya know what I'm saying.

PETERS: Yup.

FORGET: He's like, I'm, I'm, I'm pissed at him. Like, it's  
bullshit. I told him I didn't have a good feelin' about  
it, but he's like, 'that's all I can move for now, so we do  
it or we don't,' ya know, well what do we do? Then bam!  
This shit happens. I don't know what the fuck he's doin'.

PETERS: This is his paper?

FORGET: Yeah, that's paper for him. I got a phone set up  
for me and this is a phone for him. Give him this. Give  
him this, this is a charger.

PETERS: This is all the fuckin' guns he got caught with.

FORGET: It's all descriptions, serial numbers and all that  
bullshit. You can see, it says, nine millimeter, nine  
millimeter,

PETERS: Yup

FORGET: Fuckin' twenty-twos, forty.

PETERS: Forty, forty-five, forty, P-seventy two, Nine-nine,  
what the fuck is this guy doing?

FORGET: That's retarded man. That's just not thinkin', I,  
I told him, I was like, I, I just, I don't, you know what I  
think about that. He had asked me before, and I was like I  
really didn't want to fucking deal with that. I don't want  
nothing to do with that.

PETERS: That's fucking crazy. Desperate people man.

JA-750

FORGET: Yeah. I charged it, you can take the battery out  
if you need to or whatever the fuck.

PETERS: Yeah, I just don't like to carry fucking  
(inaudible).

FORGET: No I hear ya. It's fresh. I just fuckin got it  
from Wal-Mart, just, just programmed it. Umm, I'm gonna  
have to, I got his number, I'm gonna have to text him more  
time cause they didn't even have any damn, they had, this  
is the last two phones they had and they had no cards, so  
I'm gonna have to go to Eckerd's or something and I'll just  
text him the time on it. But he's got like ten bucks on it  
right now. Umm.

PETERS: And this paper.

FORGET: Yeah. I, I don't know what he's doing, I told him,  
I was like I would really rather wait, move fuckin' weed  
than any kind of bullshit like that.

PETERS: (inaudible) fuckin dumb.

FORGET: Huh?

PETERS: The Rez is so fuckin' hot right now you wouldn't  
believe it.

FORGET: The Rez? Really?

PETERS: Yeah. Cause I was, I was tryin' to get a hold of  
Matt that I wanna see him and tell him cause he was doin',  
he's movin something for somebody else and before this ice  
goes out, I gotta tell him he's done at my mothers'.  
Everybody is done at my mothers. That little canal, about  
two weeks ago, I was leaving the farm with my Monte Carlo,  
got pulled over pullin' into my driveway. And I got a

JA-751

friend that's a police dispatcher for the Tribal Police,  
and he says, and they're talking, they're talking Border  
Patrol. Border Patrol is from Burke but they're working  
down there that night. They turned around and says he  
doesn't have nothing. ICE team called me up coming off the  
Rez.

FORGET: Wow.

PETERS: Ya. Then, I went, went to ah, see this guy there,  
I was doing some business at his shop there and he turns  
around and tells me. We walked out to hook up a trailer I,  
he borrowed off me, we were hookin' up the trailer and  
everything and he goes, 'watch yourself, he goes, they're  
watching your mother's.'

FORGET: I heard Hubert was movin' shit up there.

PETERS: They're moving through Chico's.

FORGET: That's what I heard.

PETERS: Ya know, you got Adam's, you got King's, and you  
got that little marina, they're movin' right there.

FORGET: I know Adam's, King's, I'm not sure about that  
Chico. I mean, I'm sure, I'm sure if I saw the fuckin'  
place. Yeah but.

PETERS: It's like, King's is like, King's and Adam's, No  
King's and Chico's is like from here to that Green building  
away. Up that side channel a little bit on the left there.

FORGET: Like they're moving now, there's fuckin' still  
ice? It's still.

PETERS: Ah. I don't know if they're moving now, but that  
has something to do with, umm. I don't know who the fuck

JA-752

is movin' up there, but Hubert and Joe I think were doin'

something there.

FORGET: Really?

PETERS: Yeah, but I was gonna tell him, since I don't even want nothin', nothin' going on at my mom's no more. I even told my brother PJ, I said, 'are you working out of that canal,' and he goes, 'no why?' And I said, I told him exactly what that fuckin' dispatchin' guy told me. They said, they're watchin' your moms and it has something to do with that canal (inaudible).

(Phone call)

FORGET: That's gotta be my wife, that's gotta be my wife, she's going fuckin' retarded here. Yup. No. Leave me the fuck alone right now.

PETERS: Ya. But we still got ice in the creek right now. I just bought twelve, six by six, sixteen footers, we're gonna sink them in the canal. Put four of them, hammer them down as far as we can, and then we're gonna cut them all off even and then we're gonna run two across the top. Somebody.

FORGET: Really?

PETERS: Yeah, somebody tries to turn in they're gonna have a surprise of their life.

FORGET: I guess so.

PETERS: Yup. We already made a bomb for the fuckin' road comin' in.

FORGET: Really?

JA-753

PETERS: Five gallon gas can with a flare gun in to it, when the car comes through and he pulls the wire it hits that fuckin' can, it's loaded with acetylene, oxygen acetylene, you should see, hear those fuckers go off.

FORGET: Somebody's gonna get fucked up.

PETERS: Yeah, cause we already told them we said don't want nobody workin' there. Umm, Xavier and Ben were at my house one night. Thomas and the other guy left on four-wheelers and somebody's sittin' over here in the bay. They looked at him and the guy fuckin' took off up the creek. Then we, then they left with their four-wheelers to go to Sweet Dreams. Then Xavier left later on and they said, that fuckin' guy is back in there again they're at your canal. So we don't even know who.

FORGET: So you don't know who's going in your wor, your spot.

PETERS: Anybody, seems like anybody is just going in there, hit and run ya know. Park there, load their fuckin' car and haul ass. So I said, fuck em. I'll put stakes in at the end of the canal and I'm blockin' it off, I don't want nobody workin' there no more. If they're gonna be workin' there, they're gonna be going to the dock.

FORGET: Going through you right, not fuckin' sneakin' through.

PETERS: (Inaudible) My mother said that. She goes, somebody's workin that canal, she goes, I don't know who the hell it is, she goes, I'm not gettin' paid for it, so she goes, I don't want nobody workin there. I'm like, ok.

JA-754

FORGET: I told, I, I even told him. I was like ya know man, I can, I can scout, I. If, if anybody is going to get yoked over, they'll pull me over for scouting. I'd be a perfect scout. They'll be, they'll be watchin' me they're not going to be watchin' whatever. You know what I'm saying and I, I feel, I feel comfortable with that but I don't know.

PETERS: That's what I've been tellin' them, I says. I don't give a fuck what yous are doing, just I don't even want to know about it. Like, ok.

FORGET: Hmm. It's getting rough out there man, it's.

PETERS: Fuckin' guy called me up from Quebec, one of the Italian guys I was workin' with last year, huh. 'What's the prices now a days?' I said '215 and 225.' He goes, 'I can buy it up there for 125 right now.' I said, 'well why don't you fuckin' buy it then' and I hung up on him. He calls me back, 'no, no, no, no,' he goes, 'no, you miss understood me.' He goes, 'I heard, he said, that's what they're off, but I want to work with you, he goes what kind of price can you give me.' I says, 'I told you what my prices are.' He goes, 'you can't do no better?' I'm like, 'no.' He goes, 'well it's only two and quarter down here right now.' I said 'bullshit.' He goes, 'what do you mean?' I said, 'I sent guys there two days ago and they got 290.' I said 'I have five different people working with me, everybody is getting from 275 to 290 right now. I said where the fuck are you getting 225?'

FORGET: Is that raw cig..raw tobacco or cigarettes?

JA-755

PETERS: Cigarettes.

FORGET: Cigarettes. Huh.

PETERS: (Inaudible) I says, I says, 'you're not the only guy that's workin up there.' I says, 'I've got a lot of people goin' up there, so don't fuckin' lie to me man.'

FORGET: They just, they just want it all for nothing.

PETERS: Yup, I told him I said, 'I don't fuckin' work for nothing.'

FORGET: Huh. That's fucked up. Well if you have to get a hold of me anyhow, this, this is, this is the fuckin'.

PETERS: That's the one you called me on?

FORGET: Yeah, yeah. I just, like I said it's fresh, I just got it today. I went in there yesterday and they didn't have any fricken, they didn't have any phones in there. And then I go in today and they got them. I wasn't sure if they were gonna work to make out long distance calls and I took my chance on it.

PETERS: Mm hmm.

FORGET: Oh my God, she's going in insane here. She's supposed to be going for dinner with her girlfriends and the kids, and she's. I have her van. Trying to put my truck back together, the transmission pans out, and I told her. I was like, 'I gotta run to town I gotta get some oil, just relax.'

PETERS: What is that, your Dodge?

FORGET: Yeah, yeah, yup.

PETERS: Alright dude, well I'll make sure he gets this. Probably tomorrow I bet I can run it down to him.

JA-756

FORGET: Alright man.

PETERS: Even if I just give it to "X" and he can.

FORGET: Yeah, he'll get it to him.

PETERS: Yup.

FORGET: Just make sure he gets that paper like I say.

He'll, he'll call me or whatever the fuck and I'll get him,

I'm gonna text him some more time to it. He ah, he's gotta

see that paper like I told him, I was like, 'the guys, the

guy's got paper and I didn't see him, I haven't talk.' I

talked to him the last day I spoke to him with Colin, the

day everything went down, and I just told Colin this is not

good, shit went wrong something, something somewhere wasn't

right and it's not cool. And this is not cool. Fuckin'

guns by all means ya know what I mean.

PETERS: He had some guys bringing it up?

FORGET: I guess, from New Orleans or something is what he  
said to me. Yeah, it's pretty, huh, pretty serious stuff.

PETERS: That guy can get one year for every pistol he got  
caught with.

FORGET: Wow, I mean even if he's legit, cause the guy has  
no record, no, no nothing and he, he already applied for  
his concealed weapons permit he said.

PETERS: Does he has his pistol permit though?

FORGET: He's applied for it?

PETERS: Well if you, if you apply for a driver's license  
doesn't mean you can drive a car.

FORGET: I hear ya.

PETERS: (Laugh)

JA-757

FORGET: Until you got it, I hear what you're saying.

PETERS: Yeah and where the hell did these, these come from?

FORGET: Yeah.

PETERS: Yeah, know what I mean?

FORGET: Yeah, hopefully they're, they're...like, like he used that story that he got them from an inheritance but I mean...ya, where did they come from?

PETERS: After, (inaudible) ballistic testin' they'll have bodies on them huh?

FORGET: Wouldn't that be fuckin s, oh my gosh. Not good.

PETERS: Na, not good at all. Alright, I'll let you get to your wife.

FORGET: I appreciate it.

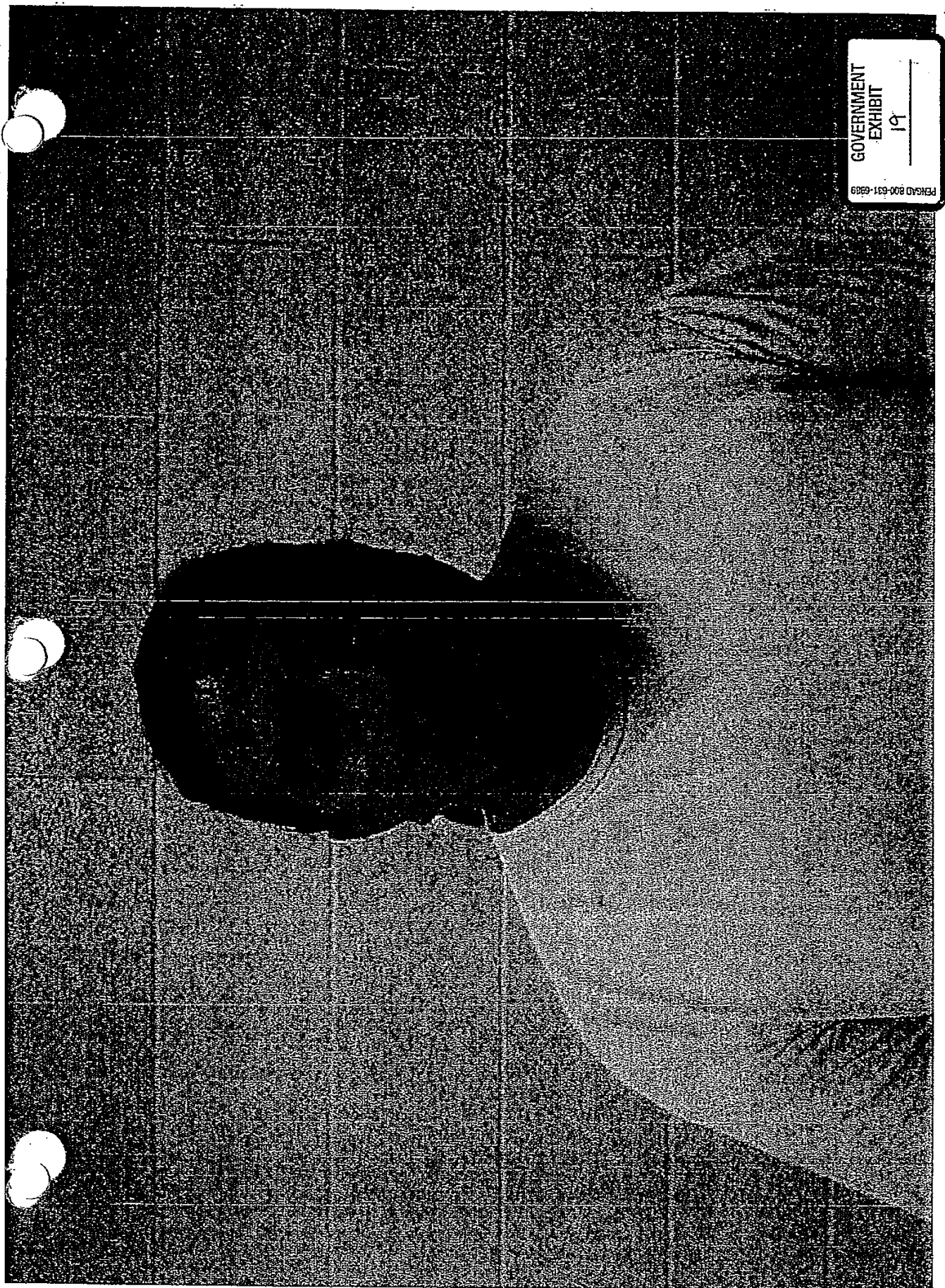
PETERS: My girlfriend is up here and I'll go take her out to dinner now I guess.

FORGET: Thanks man.

PETERS: Yup.

FORGET: Have a good one.

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GOVERNMENT  
EXHIBIT

19

PERGAD 800-631-6989

JA-759



United States Department of Justice

United States Attorney  
Northern District of New York

Gateway Building  
14 Durkee Street, Suite 340  
Plattsburgh, New York 12901-2998

Tel.: (518) 314-7800  
Fax: (518) 314-7811

January 13, 2014

Mr. Alain Forget  
c/o Kevin Nichols, esq.  
16 Elm Street  
Malone, New York 12953

Dear Mr. Forget:

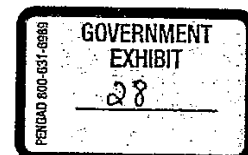
The purpose of this letter is to advise you that you are in breach of your cooperation and plea agreements.

On February 28, 2012, you entered into plea and cooperation agreements with U.S. Attorney's Office. On the same date, pursuant to your plea agreement, you pled guilty to one count of conspiracy to possess with intent to distribute and to distribute more than 100 kilograms or more of marijuana in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B). Both agreements contain the following provision:<sup>1</sup>

Should the U.S. Attorney's Office determine that the Defendant, after the date of this Agreement: (i) has committed any further crime or violated any condition of release or supervision imposed by the Court (whether or not charged) . . . the U.S. Attorney's Office will have the right, in its sole discretion, to void this Agreement and/or the Plea Agreement, in whole or in part. In the event of any such breach, the Defendant will not be permitted to withdraw his guilty plea under this Agreement, but will thereafter be subject to prosecution for any federal criminal violation of which the U.S. Attorney's Office has knowledge, including but not limited to charges that this Office has agreed to dismiss or has agreed not to prosecute.

Subsequent to your plea of guilty, the Court ordered that you be released on conditions, pending sentencing. One of the conditions of release stated that you "shall not commit another crime, in the United States or elsewhere." The U.S. Attorney's Office has learned that, in

<sup>1</sup> This provision is found in paragraph 5 of the plea agreement, entitled "Breach of Agreement," and in paragraph 11 of the cooperation agreement, entitled "Remedies for Breach."



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United States v. Forget  
(12-CR-42)  
January 9, 2014  
Page 2

December 2013, you possessed a handgun and sold that handgun to an undercover officer. This constitutes a criminal offense.

As a result, the U.S. Attorney's Office has determined that you have breached both your plea and cooperation agreements. The U.S. Attorney's Office has decided to void your cooperation agreement. In addition, at the time of sentencing, the government will make no motion for a downward departure either under U.S.S.G. § 5K1.1 or 18 U.S.C. § 3553(e).

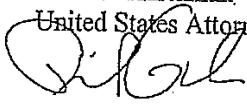
The government intends to call you as a witness in the trial of United States v. Allan Peters and any subsequent trial in which your testimony may be relevant. Although you have no agreement with the government to receive any benefit from your testimony, you are expected to provide complete and truthful testimony.

If, however, you give false, misleading, or materially incomplete testimony at trial, including any false exaggeration or minimization of the criminal involvement of any person, the U.S. Attorney's Office will have the ability to use your testimony and any evidence derived from your testimony (1) against you in a criminal prosecution for false statements, perjury, obstruction of justice, or violations of similar federal criminal statutes; (2) against you in a criminal prosecution for any criminal conduct that is the subject of your trial testimony; and (3) to impeach or rebut any contrary testimony or evidence given by or on behalf of you in any proceeding. In addition, the U.S. Attorney's Office may void your plea agreement and seek additional charges against you for your role in a drug trafficking conspiracy.

Sincerely,

Richard Hartunian  
United States Attorney

By:

  
Daniel C. Gardner  
Assistant United States Attorney

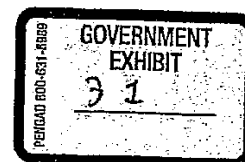
JA-761

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	<u>Stipulation of Fact #1</u>
v.	:	
	:	
ALLAN PETERS,	:	Criminal No. 13-CR-316 (GTS)
	:	
Defendant.	:	

The parties stipulate as follows:

1. On May 8, 2009, Drug Enforcement Administration (DEA) Special Agent Kevin Kadish and Task Force Officer Marc Boire took possession of six hockey-style bags from the High Peaks rest area and transported them to the DEA building in Plattsburgh, New York. The bags, and their contents, were secured in the DEA drug vault.
2. On May 13, 2009, SA Kadish and Agent Loya removed the six bags from the drug vault. Inside the hockey bags were dozens of vacuum sealed plastic bags containing suspected marijuana, which weighed 114 kilograms. On the same date, SA Kadish and Agent Loya prepared representative samples of the suspected marijuana from each of the six hockey bags. Pursuant to DEA policy, SA Kadish then packaged the representative samples and sent them to the DEA Northeast Regional Laboratory for chemical analysis via FedEx.



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3. On June 3, 2009, Forensic Chemist Diana Sanchez completed a chemical analysis of the representative samples submitted by SA Kadish to the lab and scientifically concluded that the suspected marijuana was, in fact, marijuana.

4. In conclusion, Special Agent Kevin Kadish and Task Force Officer Marc Boire took possession of six hockey-style bags from the High Peaks rest area, which contained 114 kilograms of marijuana, a Schedule I controlled substance.

The undersigned attorneys agree to stipulate to the above described evidence.

RICHARD S. HARTUNIAN  
United States Attorney

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By: Daniel C. Gardner  
Assistant U.S. Attorney  
Bar Roll No. 515333

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Mark Sacco  
Attorney for Allan Peters

JA-763

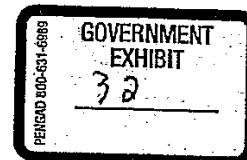
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :  
 :  
 v. : Stipulation of Fact #2  
 :  
 ALLAN PETERS, :  
 : Criminal No. 13-CR-316 (GTS)  
 :  
 Defendant. :

The parties stipulate as follows:

1. On September 15, 2010, New York State Police (NYSP) Investigator Anthony Bailey recovered six black hockey-style bags from a vehicle driven by Alain Forget. Investigator Bailey secured the six black hockey-style bags in the drug vault at the NYSP barracks in Malone, New York.

2. On September 16, 2010, NYSP Investigator William Bronner retrieved the six hockey bags from the evidence vault and transferred possession of the bags to Drug Enforcement Administration (DEA) Special Agent Andrew Hermes. SA Hermes then transported the six hockey bags to the DEA building in Plattsburgh, New York. SA Hermes and Investigator Bronner examined the contents of the bags, which contained dozens of vacuum sealed plastic bags containing suspected marijuana. Investigator Bronner removed the plastic bags, which weighed 108 kilograms.



JA-764

3. On September 16, 2010, SA Michael Laravia prepared representative samples of the suspected marijuana from each of the six hockey bags. Pursuant to DEA policy, SA Laravia packaged the representative samples and sent them to the DEA Northeast Regional Laboratory for chemical analysis via FedEx.

4. On October 5, 2010, Forensic Chemist Christopher Benintendo completed a chemical analysis of the representative samples submitted by SA Laravia and scientifically concluded that the suspected marijuana was, in fact, marijuana.

5. In conclusion, Investigator Bailey took possession of six hockey-style bags from a vehicle driven by Alain Forget, which contained 108 kilograms of marijuana, a Schedule I controlled substance.

The undersigned attorneys agree to stipulate to the above described evidence.

RICHARD S. HARTUNIAN  
United States Attorney

\_\_\_\_\_  
By: Daniel C. Gardner  
Assistant U.S. Attorney  
Bar Roll No. 515333

\_\_\_\_\_  
Mark Sacco  
Attorney for Allan Peters

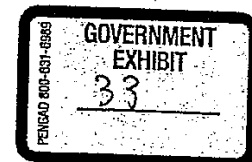
JA-765

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	<u>Stipulation of Fact #3</u>
v.	:	
	:	
ALLAN PETERS,	:	Criminal No. 13-CR-316 (GTS)
	:	
Defendant.	:	

The parties stipulate as follows:

1. On March 1, 2011, Drug Enforcement Administration (DEA) Special Agent Andrew Hermes took possession of two hockey-style bags from United States Border Patrol Agent Benjamin Labaff at the Border Patrol station in Massena, New York. Special Agent Hermes then transported the two hockey bags to the DEA building in Plattsburgh, New York and placed them in the DEA drug vault.
2. On March 2, 2011, Special Agent Hermes removed the two hockey bags from the DEA vault and transported the two hockey bags to Hyde Park, New York to effect a controlled delivery. At the conclusion of the controlled delivery, Special Agent Hermes regained possession of the two hockey bags and transported the bags back to the DEA building in Plattsburgh, New York. Special Agent Hermes secured the two bags in the DEA drug vault.
3. On March 4, 2011, SA Hermes removed the two hockey bags from the DEA drug vault and examined the contents of the bags, which contained dozens of vacuum sealed plastic bags containing



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5  
suspected marijuana. Special Agent Hermes removed the plastic bags, which weighed 44 kilograms.

4. On the same date, Special Agent Hermes prepared representative samples of the suspected marijuana from both of the hockey bags. Pursuant to DEA policy, SA Hermes packaged the representative samples and sent them to the DEA Northeast Regional Laboratory for chemical analysis via FedEx.

5. On April 28, 2011, Forensic Chemist Christopher Benintendo completed a chemical analysis of representative samples submitted by SA Hermes and scientifically concluded that the suspected marijuana was, in fact, marijuana.

6. In conclusion, Special Agent Hermes took possession of two hockey-style bags from Agent Labaff at the Massena Border Patrol station, which contained 44 kilograms of marijuana, a Schedule I controlled substance.

The undersigned attorneys agree to stipulate to the above described evidence.

RICHARD S. HARTUNIAN  
United States Attorney

By: Daniel C. Gardner  
Assistant U.S. Attorney  
Bar Roll No. 515333

JA-767

Mark Sacco  
Attorney for Allan Peters

Case 8:13-cr-00316-GTS Document 63 Filed 05/15/14 Page 1 of 10

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-v-

ALLAN PETERS,

Defendant.

Case No.: 13-CR-316 (GTS)

(Rules 29 and 33 Motion)  
Attorney Affirmation/  
Memorandum of Law

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DEFENDANT'S MOTION UNDER RULE 29 AND RULE 33

COMES NOW the Defendant, by and through his attorney, Brian P. Barrett, Esq., and respectfully submits this Motion and Memorandum of Law under Federal Rules of Criminal Procedure 29 and 33 for the Court's consideration.

1. I am an attorney licensed to practice law in the State of New York and before this Court, with offices maintained at 5676 Cascade Road, Lake Placid, New York.
2. I am the attorney of record for Allan Peters, having replaced attorney Mark Sacco. Accordingly, I am familiar with the facts and circumstances of this case, as stated herein. I make this affirmation based on my review of the case-file, trial transcripts and other documents, as well as consultation with the defendant Mr. Peters.
3. This affirmation/memorandum of law is respectfully submitted in support of a Motion for Judgment of Acquittal pursuant to Federal Rule of Criminal Procedure 29(c) and Motion for New Trial pursuant to Federal Rule of Criminal Procedure 33.

Background and Statement of Facts

The defendant Allan Peters was found guilty following a four day jury trial in January 2014 of a single count of Conspiracy to Knowingly Distribute, or to Knowingly Possess with the Intent to Distribute in excess of 1,000 kilograms of Marijuana. Attorney Mark Sacco represented the defendant at trial, and timely filed a Notice of Motion under FRCP 29 for a judgment of acquittal, and to set aside the verdict, and a motion for a new trial under FRCP Rule 33. The defendant then terminated Mr. Sacco's representation and hired Mr. Barrett who requested an additional 30 days to analyze the case and to prepare this memorandum of law. The Court granted this request and set the filing date on or before May 15, 2014.

At trial, the prosecution played an audio-recording of a conversation between the defendant and a co-conspirator, who was working as a cooperating-witness for the government. The conversation consisted of the cooperator telling the defendant about illegal guns that were seized by the state police. The government introduced this evidence as a way to explain the nature of the conspiracy even though there were no gun charges in the indictment. At no other point during the trial was there any evidence linking the defendant to any involvement or knowledge of guns in the conspiracy. There was a point during the recorded conversation where the defendant states, in essence, that he had previously been charged and convicted of a gun offense, and that he served time for it. That portion of the conversation was supposed to be redacted, as agreed upon by defense attorney Sacco and the Assistant United States Attorney. Mr. Sacco objected and a bench conference was held (Attachment A). The government stated that they had erred in not removing the portion of the audio recording where the defendant discusses the prior conviction for gun charges.

In addition, the government only presented evidence through three cooperating witnesses, all of whom provided testimony that was not truthful or credible. The sufficiency of the

evidence and credibility of its witnesses was so weak, that it makes the government's blunder of playing the audio portion of the defendant stating that he had previously served time for a gun charge, even more prejudicial to the defendant's right to a fair trial.

### Law and Argument

#### Standard of Review

##### Rule 29

In deciding a motion brought under rule 29 of the Federal Rules of Criminal Procedure the ultimate question for the court is, "whether, after viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Espaillet, 380 F.3d 713, 718 (2d Cir.2004) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

"[C]ourts must be careful to avoid usurping the role of the jury when confronted with a motion for acquittal." United States v. Jackson, 335 F.3d 170, 180 (2d Cir.2003). A defendant's burden on such a motion is not insurmountable, a judgment of acquittal will be granted if no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. United States v. Cassese, 428 F.3d 92, 98 (2d Cir.2005). The court must not be myopic in its analysis. Instead, it must consider the totality of the evidence, each piece in conjunction with the others. See United States v. Ozby, 2007 WL 656049 (N.D.N.Y. J. Sharpe) *citing*, United States v. Cassese, 428 F.3d 92, 98-99 (2d Cir.2005), *citing*, United States v. Glenn, 312 F.3d 58, 69 (2d Cir.2002). See also United States v. Cassese, 428 F.3d 92 (2<sup>nd</sup> Cir. 2005)(Judgment of acquittal affirmed where element of the offense not proven beyond a reasonable doubt); United States v.

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Jones, 393 F.3d 107 (2<sup>nd</sup> Cir. 2004)(remanding with instructions to enter judgment of acquittal where insufficient evidence that defendant was involved in the charged conspiracy).

### Rule 33

Rule 33 provides that "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed.R.Crim.P. 33(a). This rule

by its terms gives the trial court broad discretion to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice. The district court must strike a balance between weighing the evidence and credibility of witnesses and not wholly usurping the role of the jury. Because the courts generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility, it is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment. An example of exceptional circumstances is where testimony is patently incredible or defies physical realities, although the district court's rejection of trial testimony by itself does not automatically permit Rule 33 relief.

The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice. The trial court must be satisfied that competent, satisfactory and sufficient evidence in the record supports the jury verdict. The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation.

United States v. Ferguson, 246 F.3d 129, 133-34 (2d Cir.2001)(internal quotation marks and citations omitted).

The Second Circuit has affirmed district court decisions that have granted defendants new trials based upon the weight of the evidence. In United States v. Autori, 212 F.3d 105, 121(2d Cir. 2000), the court found that a new trial was properly granted, even though the evidence was legally sufficient, where "the credibility of the principle witness was weak" and "the soundness of the verdict is highly doubtful." In United States v. Robinson, 430 F. 3d 537 (2d Cir. 2005), the court affirmed the granting of the defendant's new trial motion where the credibility of the

government's identification witness was impeached by his prior failure to identify the defendant on two occasions. See, Robinson, 430 F.3d at 543.

In exercising the broad discretion conferred under Rule 33, a court may weigh the evidence and assess the credibility of witnesses. The rule confers broad discretion upon a trial court to set aside a jury verdict and order a new trial in order to avert a perceived miscarriage of justice. See United States v. Sanchez, 969 F.2d 1409 (2<sup>nd</sup> Cir. 1992). A defendant seeking a new trial bears the burden of demonstrating the "essential unfairness of the [original] trial." United States ex rel. Darcy v. Handy, 351 U.S. 454, 462 (1956). In adjudicating a Rule 33 motion, a court is entitled to weigh the evidence and, in so doing, to evaluate the credibility of witnesses. See Sanchez, 969 F.3d at 1413.

#### The Trial

The government called three principle cooperating witnesses: Cheryl Lobdell, Corey Spinner, and Alain Forget. All three witnesses were involved in the alleged conspiracy and were motivated to testify against the defendant by the assurances of the government that they would receive reduced sentences for their testimony. None of the three witnesses were credible, and no reasonable jury could have concluded, based on the evidence presented through their testimony, that the defendant was guilty beyond a reasonable doubt.

#### Cheryl Lobdell

Cheryl Lobdell is a life-long alcoholic and drug addict who is serving a 33 month sentence for her involvement in the alleged conspiracy. (Lobdell Tr. at 2-3). She has been involved with drug smuggling for more than 20 years. (Lobdell Tr. at 74). Lobdell testified that she expected to receive a benefit from the government in exchange for her testimony, (Lobdell

Tr. at page 5), and that while under a cooperation agreement with the government used cocaine in violation of the agreement. She attempted to deceive the pretrial services office by purposely diluting her urine prior to a drug screen, and ultimately tested positive for cocaine use. (Lobdell Tr. at 6). Despite her dishonesty and problems while cooperating with the government, Lobdell received a significant reduction in sentence, 27 months under the mandatory minimum of 60 (Lobdell Tr. at 7 and 65).

Lobdell testified that she had previously been convicted of grand larceny and falsifying business records. (Lobdell Tr. at 8). She was sentenced to five years of state probation for this offense, and while on probation continued to deceive the probation department by continuing to do drugs and smuggle marijuana. (Lobdell Tr. at 67). Lobdell confirmed on cross-examination, that she continued to try to deceive probation by diluting drug screens by drinking enormous amounts of Gatorade. (Lobdell Tr. at 72). Lobdell was still on state probation at the time of her arrest for the current federal charge, but did not inform her state probation officer of this fact, another act of deception. (Lobdell Tr. at 68). She was released from state probation by an unwitting probation department. Her dishonesty served her well. (Lobdell Tr. at 65-68). Lobdell, while working as an informant for the DEA, deceived her handling agents by continuing to smuggle marijuana without their knowledge. (Lobdell Tr. at 69).

The extent of Lobdell's knowledge of the defendant's involvement surrounded her claims that the defendant paid her on two or three occasions. However, she could not give even approximate dates or times that this occurred—except one alleged occasion following her arrest in 2009. Nor did she have any text-messages that she claims were exchanged between her and the defendant. She testified that she handed over her cell phone to the government presumably for forensic analysis. However, the government did not introduce any evidence of these text

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messages at trial. (Lobdell Tr. 83-86). Lobdell's testimony was not credible both for its content and because of the fact of who she is as a person: a drug addicted alcoholic who lied to the government, lied to her state probation officer, and previously stole from her employer. No reasonable jury could have found the defendant guilty beyond a reasonable doubt, and we respectfully urge this Court to grant the defendant's motion for judgment of acquittal.

Corey Spinner

Corey Spinner was also seeking a benefit from the government in an effort to get below the 5 year mandatory minimum sentence for trafficking 100 kilograms of marijuana. Spinner was a driver/courier for the smuggling organization, and was recruited by Allain Forget. (Spinner Tr. 7-8). Spinner testified that he would drive to the defendant's mother's property when prompted by Forget in order to pick up a load of marijuana. He testified that he never saw the defendant at the property; that he was paid by Forget, not the defendant, and that he never had a conversation with the defendant. (Spinner Tr. at 28-29). Spinner did not testify that he ever witnessed the defendant handle marijuana, or direct others to do so in any manner. In fact Spinner did not have any personal knowledge of the defendant's involvement in the alleged conspiracy. What he did know, was that Alain Forget was the leader of the marijuana conspiracy. No reasonable jury, based on the testimony of Cheryl Lobdell and Corey Spinner, could have convicted the defendant of the charges beyond a reasonable doubt.

Alain Forget

Alain Forget also sought a benefit from the government in turn for his testimony against the defendant. (Forget Tr. at 120). Forget testified that he was a scout for couriers, and that he would pick-up loads of marijuana from the defendant's mothers house (Forget Tr. at 41), and

Case 8:13-cr-00316-GTS Document 63 Filed 05/15/14 Page 8 of 10

that he was a drug user during these times. (Forget Tr. at 126). According to Forget, a man named Collin would be present and have private conversations with the defendant. Forget never heard the nature of these conversations, and never spoke directly with the defendant during these times. (Forget TR. at 51). Forget also testified that he had never seen the defendant purchase or sell marijuana. (Forget Tr. at 51). At least one portion of Forget's testimony regarding the defendant's alleged involvement in the smuggling operation, came in the form of hearsay evidence. Forget testified about an individual named Xavier a/k/a X-man and what X-man told him about the defendant. (Forget Tr. at 60). Forget in essence had no first-hand knowledge that the defendant was involved in marijuana smuggling.

On cross-examination, Forget acknowledged that there were significant cigarette/tobacco smuggling operations in place in the same area, and how he had recorded conversations with the defendant regarding how lucrative cigarette smuggling can be. (Forget Tr. at 135-136) and (Government Exhibit 17). Moreover, Mr. Sacco elicited testimony of how Forget was masterful at deceiving other people. The defendant (Forget TR. at 139-140); Colin (146-147); State Police Patrols (152-153).

Lobdell, Spinner, and Forget's non-credible testimony taken together in aggregate was insufficient for a reasonably jury to find the defendant guilty beyond a reasonable doubt. Based on their non-credible testimony, coupled with the fact that there were no seizures linked to the defendant, no forensic evidence presented by the government linking the defendant to the conspiracy, and no other credible evidence presented, this Court should grant the defendant's motion for a judgment of acquittal under Rule 29.

FRE 404(b)

Federal Rule of Evidence 404(b) prohibits the government from introducing “other crimes, wrongs, or acts” to prove the character of a person in order to show “action in conformity therewith. Permitting the introduction of “other crimes” evidence poses the danger that the jury will view it as reflecting on the defendant’s character and reach a verdict because it has concluded that the party is a bad person deserving of punishment. See United States v. Germosen, 139 F.3d 120, 128 (2<sup>nd</sup> Cir. 1998); United States v. Downing, 297 F.3d 52, 58 (2<sup>nd</sup> Cir. 2002); United States v. Linares, 367 F.3d 941, 945-46 (D.C. Cir. 2004). Moreover, the government must provide notice, upon request of defense counsel, of the general nature of any other crimes evidence it intends to introduce at trial for any purpose. FRE 404(b)(11).

The government whether inadvertently or not, played an audio recording (Government Exhibit 14) where the defendant states that he was, previous to the instant charge, convicted of a gun offense and served time for it. A transcript of the audio recording—Government Exhibit 17—shows the recorded conversation except with the section where the defendant discusses his previous conviction is removed. But the actual recording was played for the jury, and not edited or redacted. Mr. Sacco objected and a side-bar conference was held.

This evidence heard by the jury clearly falls under Rule 404(b)’s prohibition against admitting prior bad acts. The only thought in a juror’s mind could be that the defendant is a bad guy—he was previously involved with illegal guns, he’s an ex-con—and therefore, that he was likely involved in this conspiracy to smuggle and distribute marijuana. If a juror was “on-the-fence” as to whether the defendant was guilty—which is certainly plausible given the government’s weak case—the defendant’s own words that he was previously convicted of gun charges would change that juror’s mind. The introduction of the audio evidence was highly

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prejudicial, and its introduction prevented the defendant from getting a fair trial. As a result a manifest justice has occurred and the only remedy would be a new trial.

**Conclusion**

Based on the forgoing, we respectfully request that the Court grant the defendant's motion for a judgment of acquittal under Rule 29, or in the alternative to order a new trial under Rule 33.

Dated: Lake Placid, New York  
May 15, 2014

Law Office of Brian P. Barrett

*/s/ Brian P. Barrett*

---

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United States Courthouse  
James T. Foley Courthouse  
Albany, New York 12207  
Via Electronic Filing Only

Daniel C. Gardner, Esq.  
Assistant United States Attorney  
Via Electronic Filing Only

Allen Peters

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

8:13-CR-0316  
(GTS)

ALLAN PETERS,

Defendant.

APPEARANCES:

OF COUNSEL:

HON. RICHARD S. HARTUNIAN  
United States Attorney for the  
Northern District of New York  
Counsel for the Government  
14 Durkee Street, Room 340  
Plattsburgh, NY 12901

DANIEL C. GARDNER, ESQ.  
Assistant United States Attorney

LAW OFFICE OF BRIAN P. BARRETT, ESQ.  
Counsel for Defendant Ross  
307 South Clinton Street, Suite 300  
Syracuse, NY 13202-1250

BRIAN P. BARRETT, ESQ.

HON. GLENN T. SUDDABY, United States District Judge

**DECISION and ORDER**

Currently before the Court, in this criminal proceeding against Allan Peters (Defendant) is a post-trial motion by Defendant to set aside the verdict and enter acquittal, or, in the alternative, for a new trial. (*See* Dkt. Nos. 46, 63.) The Government has opposed Defendant's motion. (*See* Dkt. No. 66.) For the reasons set forth below, Defendant's motion is denied.

**I. RELEVANT BACKGROUND**

The sole count of the Indictment in this action against Defendant charged him with conspiracy to possess with the intent to distribute and to distribute one thousand kilograms or more of marijuana, a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846. (Dkt. No. 6.)

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On January 27, 2014, a jury trial was commenced before this Court. On January 30, 2014, the jury returned a unanimous verdict of guilty.

On February 12, 2014, Defendant filed a motion for acquittal pursuant to Fed. R. Crim. P. 29(c) or, in the alternative, for a new trial pursuant to Fed. R. Crim. P. 33. (*See* Dkt. No. 46.) With permission of the Court, Defendant later filed a memorandum of law and attorney affirmation in support of his motion. (*See* Dkt. No. 63.)

Because the parties have submitted post-trial briefs that demonstrate an accurate understanding of the relevant facts of this case, the Court will not provide a detailed description of those facts in this Decision and Order, which is intended primarily for the review of the parties. Rather, the Court will refer to those facts only when necessary in its analysis of Defendant's motion.

## II. GOVERNING LEGAL STANDARDS

### A. Motion for a Judgment of Acquittal

In asserting a motion challenging a conviction based on insufficient evidence pursuant to Rule 29(c), “[i]t is well established that a defendant . . . bears ‘a heavy burden.’” *United States v. Lohm*, 90-CR-0301, 1993 WL 488635, at \*3 (N.D.N.Y. Nov. 26, 1993) (Munson, J.) (quoting *United States v. Soto*, 959 F.2d 1181, 1185 (2d Cir. 1992)). “[D]efendant must demonstrate that there was no evidence from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.” *United States v. Strauss*, 999 F.2d 692, 696 (2d Cir. 1993) (internal quotations omitted). “When analyzing this type of motion, the court will review the evidence in the light most favorable to the prosecution and draw all reasonable inferences in its favor.” *Lohm*, 1993 WL 488635, at \*3 (citing *United States v. Medina*, 944 F.2d 60, 66 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1508 (1992)). “If the reviewing court finds, on the evidence in the

record, 'that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' the jury's verdict must be upheld." *Id.* (quoting *United States v. Gordils*, 982 F.2d 64, 70 [2d Cir. 1992]). "In other words the court will not independently engage in weighing the evidence or assessing credibility, but rather will uphold the jury's verdict so long as the evidence, whether direct or circumstantial, when viewed as a whole fairly supports that verdict." *Id.* (citing *Glasser v. United States*, 315 U.S. 60, 80 (1942)). "Finally, if the jury had a full opportunity to assess credibility, weigh the evidence, and draw justifiable inferences in reaching its verdict, 'the evidence need not eliminate every hypothesis of innocence' in order to support the conviction." *Id.* (quoting *United States v. Ragosta*, 970 F.2d 1085, 1090 (2d Cir.), *cert. denied*, 113 S. Ct. 608 (1992) (citations omitted)).

#### **B. Motion for a New Trial**

"It is well settled that when a jury returns a verdict contrary to the weight of the evidence, the trial court has broad discretion under Rule 33 to set aside the jury's verdict and order a new trial to avoid a miscarriage of justice." *Lohm*, 1993 WL 488635, at \*8 (citing *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992), and *United States v. Lombardozzi*, 343 F.2d 127, 128 (2d Cir.), *cert. denied*, 381 U.S. 938 (1965)). "To warrant such a result, '[t]he evidence must preponderate heavily against the verdict such that it would be a miscarriage of justice to let the verdict stand.'" *Lohm*, 1993 WL 488635, at \*8 (quoting *United States v. Delano*, 825 F. Supp. 534, 544 (W.D.N.Y. 1993)) (other citation omitted). "Within the rubric of Rule 33, the trial court's authority to examine the evidence is much broader than on a motion challenging the sufficiency of the evidence." *Id.* "The court is empowered to 'weigh the evidence and in so doing evaluate for itself the credibility of the witnesses.'" *Id.* (quoting *Sanchez*, 969 F.2d at 1413).

Having said that, trial courts “must defer to the jury’s resolution of the weight of the evidence and the credibility of the witnesses.” *United States v. LeRoy*, 687 F.2d 610, 616 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983). “It is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment.” *Sanchez*, 969 F.2d at 1414 (citing *United States v. Kuzniar*, 881 F.2d 466, 470 [7th Cir. 1989]). “Where testimony is patently incredible or defies physical realities, it may be rejected by the court, despite the jury’s evaluation.” *Id.* (citations omitted). “But the trial judge’s rejection of all or part of the testimony of a witness or witnesses does not automatically entitle a defendant to a new trial.” *Id.* (citation omitted). Rather, “[t]he test is whether it would be a manifest injustice to let the guilty verdict stand.” *Id.* (internal quotation marks and citations omitted).

### III. DISCUSSION

#### A. The Parties’ Briefing on Defendant’s Motion

In support of his motion for acquittal, Defendant argues that the guilty verdict was against the weight of the evidence because the vague testimony of cooperating witnesses Corey Spinner, Cheryl Lobdell and Alain Forget did not prove beyond a reasonable doubt that Defendant knew or that it was reasonably foreseeable that his co-conspirators possessed or distributed one thousand kilograms or more of marijuana. In the alternative, Defendant seeks a new trial, arguing that the Government’s inadvertent introduction of evidence of Defendant’s prior gun conviction violated Rules 403 and 404(b) of the Federal Rules of Evidence resulting in unfair prejudice to Defendant. Defendant further argues that the Government’s error in this regard was even more prejudicial to him due to the insufficiency of the evidence, including the incredible testimony of the cooperating witnesses.

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The Government argues that (1) Defendant is unable to meet his burden under Rule 29 because (a) he has failed to show that the testimony of the cooperating witnesses was incredible as a matter of law, and (b) the cooperating witnesses' testimony established all elements of the offence; and (2) Defendant is unable to meet his burden under Rule 33 because (a) Defendant's recorded statement was admissible under Fed. R. Evid. 404(b) as background information, (b) even if the statement was not admissible, the Government's inadvertent offering of the statement was harmless based on the strength of the Government's case, the lack of the statement's relevance to a critical aspect of the case, the brief nature of the statement, and the Court's limiting instruction, and (c) there are no exceptional circumstances that warrant intrusion upon the jury's credibility assessment.

**B. Rule 29(c) Motion for Acquittal**

Generally, for the reasons stated in the Government's response, Defendant's Rule 29(c) motion is denied. (*See* Dkt. No. 66, at 4-9.) The Court would only add the following brief analysis.

The Court of Appeals for the Second Circuit has noted, regarding challenges to credibility in support of a motion for acquittal,

“[T]he proper place for a challenge to a witness's credibility is in cross-examination and in subsequent argument to the jury,” *United States v. Roman*, 870 F.2d 65, 71 (2d Cir.1989) (quotation marks omitted), not in a motion for a judgment of acquittal. We have explained that even the testimony of a single accomplice witness is sufficient to sustain a conviction, provided it is not “incredible on its face,” *United States v. Florez*, 447 F.3d 145, 155 (2d Cir.2006), or does not “def[y] physical realities,” *United States v. Côté*, 544 F.3d 88, 101 (2d Cir.2008) (quotation marks omitted).

*United States v. Truman*, 688 F. 3d 129, 139 (2d Cir. 2012). In that same case, the Court vacated a lower court's finding that a witness's testimony was incredible as a matter of law where the

lower court cited, among other things, the witness's role as an accomplice testifying under a cooperation agreement, his breach of that agreement, and his criminal history and history of drug and alcohol abuse. *See id.*, at 139-140. In vacating, the Court noted that, although the cited factors impaired the witness's credibility, they did not render it incredible as a matter of law. The Court further noted that such factors "are relevant to the weight the jury should accord to the evidence, and do not . . . justify the grant of a judgment of acquittal." *Id.* (quoting *Coté*, 544 F.3d at 100).

Similarly, here, the jury heard the testimony of the cooperating witness on both direct and cross examination and the Court's instructions regarding credibility determinations. Accordingly, the Court will not invade the jury's determination in this regard.

Moreover, as the Government noted in its response papers, the cooperating witnesses provided testimonial evidence sufficient for any rational juror to find each element of the offense beyond a reasonable doubt. (*See* Dkt. No. 66 at 7-9.)

For these reasons, Defendant's motion for acquittal is denied.

### **C. Rule 33 Motion for a New Trial**

Generally, for the reasons stated in the Government's response, Defendant's Rule 33 motion is denied. (*See* Dkt. No. 66, at 9-17.) The Court would only add the following brief analysis.

During the initial playing of a recording of a conversation between Alain Forget and Defendant, the Government inadvertently included the following statement by Defendant: "Yeah, cause I told him, I said, I don't want anything to do with guns. I went to jail for that already." The statement was omitted from every subsequent playing of the recording for the jury as well as the transcript of the recording. Moreover, the Court gave a detailed limiting

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instruction to the jury, explaining that they may not consider the evidence of Defendant's gun conviction as a substitution for evidence of the indicted offense or as evidence of Defendant's bad character. Further, the Court instructed the jury that they may only consider such evidence for the limited the purpose of the background, history and nature of the relationship between the Defendant and the cooperating witnesses and Defendant's state of mind.<sup>1</sup>

---

<sup>1</sup> The text of the limiting instruction is, in sum and substance, as follows:

The Government has offered evidence tending to show the existence of other criminal relationships between the Defendant and a witness who has testified for the Government. Specifically, you have heard evidence in this trial concerning allegations that during the course of the conspiracy, there was an attempt to smuggle guns into Canada using the Defendant's property, which, the Government contends, is the same manner in which marijuana was smuggled into the United States from Canada.

In that connection, let me remind you that the Defendant is not on trial for committing any acts that are not alleged in the Indictment. Accordingly, you may not consider this evidence of the other conduct as a substitute for proof that the Defendant committed the crime charged in the Indictment. Nor may you consider this evidence as proof that the Defendant has a criminal personality or bad character. The evidence of the other conduct was received into evidence for a much more limited purpose and you may consider it only for that limited purpose.

More specifically, evidence of this other conduct was received into evidence for the purpose of helping you to understand the background, history and nature of the relationship between the Defendant and the Government's witnesses. In addition, evidence of this other conduct was received into evidence as relevant to establish the Defendant's state of mind in carrying out the acts charged in the Indictment. For example, if you determine that the Defendant committed the acts charged in the Indictment as well as the acts involved in the other conduct, then you may, but you need not draw an inference that, in doing the acts charged in the Indictment, the Defendant acted knowingly and intentionally and not because of some mistake, accident or other innocent reasons.

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To be sure, Rule 404(b) of the Federal Rules of Evidence permits the admission of evidence of a crime, wrong or other act in order to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident.” Fed. R. Evid. 404(b). The Court, in denying Defendant’s motion for a mistrial, first explained that a mistrial is an extreme remedy, which is not warranted under the circumstances of this case. The Court further explained that the fact that Fed. R. Evid. 404(b) allows the admission of background evidence belies Defendant’s assertion of prejudice.

Given the overwhelming evidence of Defendant’s guilt, the single, brief reference to Defendant’s prior gun conviction and the Court’s detailed limiting instruction to the jury, Defendant cannot meet his burden to show that the guilty verdict was contrary to the weight of the evidence or that exceptional circumstances exist warranting a new trial.

For these reasons, Defendant’s Rule 33 motion for a new trial is denied.

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These are the sole purposes for which you may consider evidence of the prior relationship between the Defendant and the Government’s witness. Evidence of that other conduct may not be considered by you for any other purpose. Specifically, you may not use this evidence to conclude that, because the Defendant committed the acts involved in the other conduct, he must also have committed the acts charged in the Indictment. Nor may you consider any evidence that the Defendant may have been convicted of any other crime. Any prior criminal conduct or conviction of the Defendant which may have been mentioned or presented through any evidence is not relevant and may not be considered by you. Once again, I stress that the Defendant is not on trial for committing any acts that are not alleged in the Indictment.

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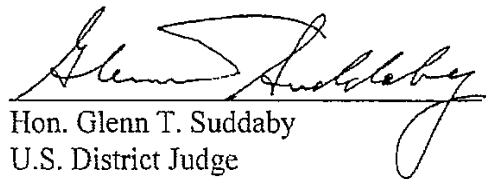
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**ACCORDINGLY** it is

**ORDERED** that Defendant's motion for acquittal and/or a new trial (Dkt. No. 46) is

**DENIED.**

Dated: July 9, 2014  
Syracuse, New York

  
Hon. Glenn T. Suddaby  
U.S. District Judge

JA-787

1 UNITED STATES DISTRICT COURT  
 2 NORTHERN DISTRICT OF NEW YORK

3  
 4 UNITED STATES OF AMERICA, )  
 5 ) CASE NO.: 8:13-CR-316  
 6 VS. )  
 7 ALLAN PETERS, )  
 8 Defendant. )  
 9

10 TRANSCRIPT OF PROCEEDINGS  
 11 BEFORE THE HON. GLENN T. SUDDABY  
 12 THURSDAY, FEBRUARY 12, 2015  
 13 ALBANY, NEW YORK

14 FOR THE GOVERNMENT:  
 15 Office of the United States Attorney  
 16 By: Douglas G.N. Collyer, AUSA  
 17 14 Durkee Street, Room 340  
 18 Plattsburgh, New York 12901

19 FOR THE DEFENDANT:  
 20 Dennis B. Schlenker, Esq.  
 21 174 Washington Avenue  
 22 Albany, New York 12210

23 THERESA J. CASAL, RPR, CRR, CSR  
 24 Federal Official Court Reporter  
 25 445 Broadway, Room 509  
 Albany, New York 12207

THERESA J. CASAL, RPR, CRR  
 UNITED STATES DISTRICT COURT - NDNY

*USA v. Peters - 13-CR-316*

1 (Court commenced at 11:10 AM.)

2 THE CLERK: United States of America versus Allan  
3 Peters, docket 13-CR-316. Could we have appearances for the  
4 record, please?

5 MR. COLLYER: Douglas Collyer from the Government.  
6 Good morning, your Honor.

7 THE COURT: Good morning.

8 MR. SCHLENKER: Good morning, Judge. Dennis B.  
9 Schlenker for the defendant, Allan Peters.

10 THE COURT: Good morning, Mr. Schlenker. We are  
11 here for sentencing. Are counsel both ready to proceed?

12 MR. COLLYER: Yes, sir.

13 THE COURT: You are here for Miss Kopita, I take  
14 it?

15 MR. COLLYER: I've taken away the case as a whole.

16 THE COURT: You have?

17 MR. COLLYER: Yes.

18 THE COURT: Good to see you, Mr. Collyer.

19 MR. SCHLENKER: And defendant is ready as well,  
20 your Honor.

21 THE COURT: Okay, very well. Counsel, have you  
22 received the presentence report, which was dated June 16th  
23 of 2014, the addendum dated July 14th of 2014, and the  
24 second addendum, which was dated December 16th of 2014?  
25 Government receive those?

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1 MR. COLLYER: Yes, your Honor, I received each of  
2 those documents, I've had time to review them and I do not  
3 have any new objections.

4 THE COURT: Okay. And Mr. Schlenker.

5 MR. SCHLENKER: Yes, your Honor. I reviewed the  
6 documents, my client has had full opportunity to review the  
7 documents and to consult with me regarding the import of  
8 those.

9 THE COURT: Is that right, Mr. Peters, ya had an  
10 opportunity to go over these documents with your attorney?

11 THE DEFENDANT: Yes, I have.

12 THE COURT: Okay, very well. Counsel, any  
13 objections to the facts as stated in the presentence report  
14 for the Government?

15 MR. COLLYER: No, sir.

16 THE COURT: Mr. Schlenker?

17 MR. SCHLENKER: Only that, your Honor, as my  
18 sentencing memorandum set forth, defendant proceeded to  
19 trial and takes no position with respect to the factual  
20 allegations, which were largely provided by the Government  
21 and agents in the matter of the preparation of the PSIR.  
22 Not to incur the amity of the Court, but Mr. Peters, as he  
23 sits here, still asserts his innocence in this case.

24 THE COURT: Okay. And, of course, he didn't  
25 comment for the Probation Officer in the preparation of the

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1 report.

2 MR. SCHLENKER: That's correct, he did not. We  
3 have an objection issue later on, but he did not give any  
4 statements or --

5 THE COURT: I noted that.

6 MR. SCHLENKER: I think it was wise that he  
7 didn't.

8 THE COURT: It was on advice of counsel I saw --

9 MR. SCHLENKER: Thank you.

10 THE COURT: -- so that's all fine. Any objections  
11 to the offense level calculations for the Government?

12 MR. COLLYER: No, your Honor.

13 THE COURT: Mr. Schlenker?

14 MR. SCHLENKER: No, your Honor.

15 THE COURT: And how about to the criminal history  
16 computation, Government?

17 MR. COLLYER: No, your Honor.

18 THE COURT: Mr. Schlenker?

19 MR. SCHLENKER: No, your Honor. We agreed that it  
20 was level II, criminal history category II.

21 THE COURT: Very well. Mr. Collyer, go ahead,  
22 sir, on behalf of the Government.

23 MR. COLLYER: Thank you, your Honor. Your Honor,  
24 the defendant played an indispensable role in this drug  
25 trafficking organization. He supplied land that was located

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1 on the waterfront with a small canal located at the end of a  
2 dead-end road on the reservation where it was virtually  
3 impossible for law enforcement to operate any effective  
4 surveillance or interception. And this control over the  
5 organization's hub was vital to its operation. And although  
6 this vital role could have been relatively hands off, the  
7 defendant also played an active role in the organization's  
8 operation. He acted as a currency exchange, he took in and  
9 dispensed cash payments on behalf of the organization, he  
10 was present for nearly all of the smuggling activities, he  
11 procured at least one vehicle that was used for smuggling  
12 activities and he operated, on occasion, as a scout for  
13 loads of marijuana being smuggled into the United States  
14 sometimes as far as Interstate 87. So not only did he  
15 provide infrastructure, but he actively participated in the  
16 activities.

17 In 1998, the defendant was convicted of conspiracy  
18 to possess and distribute machine guns, involved in a  
19 conspiracy to illegally acquire machine guns, convert them  
20 from semi-automatic to fully automatic, deface the  
21 identification information and then sell them, for which he  
22 was sentenced to 60 months' incarceration.

23 Given his instant conviction, it's clear that his  
24 prior sentence was inadequate to deter him from criminal  
25 conduct or from participating in criminal enterprises and

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1 it's equally clear that there exists still a need to protect  
2 the public from this defendant.

3 The Government additionally relies on the  
4 submissions previously filed with the Court in requesting  
5 the Court mete a sentence within the appropriate guidelines.  
6 Thank you.

7 THE COURT: Okay. Mr. Collyer, we can do this one  
8 of two ways: I can just give Mr. Schlenker an opportunity  
9 to respond at this point and then address your request for  
10 an enhancement at that time, or I can allow ya to do it now.  
11 What would you like to do, sir?

12 MR. COLLYER: I have no preference, your Honor,  
13 however the Court would like to proceed.

14 THE COURT: Counsel, do you want to address that  
15 after you make your initial remarks or do it all at once?

16 MR. SCHLENKER: Let's do it all at once, Judge.

17 THE COURT: Okay. The Government made its  
18 submission asking for an upward enhancement based on an  
19 obstruction of justice.

20 MR. COLLYER: That's correct, your Honor.

21 THE COURT: Why don't you just -- I have your  
22 submission, it's been reviewed, why don't you go ahead and  
23 make your record with regard to that, sir.

24 MR. COLLYER: Thank you, your Honor. As -- what  
25 is not disputed is that the defendant did, in fact, write

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1 that letter and send that letter to an inmate who was being  
2 held with a co-conspirator and cooperating witness. It's  
3 also not disputed that that co-conspirator was able to  
4 obtain a copy of that letter and that's how we were able to  
5 obtain it through his counsel. We raise two points for the  
6 obstruction: The first is the letter itself, which the  
7 Court has, contains language, albeit somewhat ambiguous, but  
8 language that could be interpreted as a threat against the  
9 physical safety of a co-conspirator, and therefore, under  
10 the case law I provided to the Court, would be appropriate  
11 for the two-level obstruction enhancement. Secondly,  
12 that obstruction charge or obstruction enhancement is  
13 requested as there are other co-conspirators in Canada to  
14 whom we submit that letter was sent and that the prosecution  
15 against those individuals would require this cooperating  
16 defendant's continued cooperation. Additionally, because of  
17 the details and the specific subject matter that was sent,  
18 that being the cooperation agreement and a seven-page  
19 proffer statement of that cooperating defendant with  
20 specific details about the organization being sent there,  
21 that put those individuals on notice that they were the  
22 subject of at least investigation, at most an indictment,  
23 possibly wanted, and pursuant to other case law submitted in  
24 our request, that secondarily and independently could  
25 operate as a means to enhance the sentence. However, when

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1 you consider both arguments together, I would say it's  
2 clear.

3 With respect to counsel's submission with respect  
4 to mainly two arguments, the first being that some of those  
5 documents were public record, I would draw the Court's  
6 attention to the Jackson case, which we submitted in our  
7 papers, where, again, those documents that were sent were  
8 public record, but the Second Circuit said that's  
9 inconsequential. What's important is the documents being  
10 affirmatively sent to people who otherwise would not have  
11 gotten them.

12 Counsel's second point raised is to the specific  
13 intent. As the Court's aware, the Government can never  
14 outwardly prove someone's mens rea, you must rely on  
15 circumstantial evidence, and we've submitted case law that  
16 the Court can rely on circumstantial evidence and all the  
17 reasonable circumstances drawn from that evidence in whether  
18 to give an enhancement or not. I would submit that the  
19 Court and everyone is aware that the defendant sent the  
20 letter and we know the content of the letter, we have the  
21 letter, and that the reasonable inferences from that letter,  
22 from the content and from the actions of sending it, show  
23 the defendant was acting with specific intent; namely, he  
24 sent this letter to multiple other individuals and to the  
25 inmate at the jail. You simply don't accidentally mail

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1 something multiple times. Additionally, what's sent in the  
2 letter is specifically what he sent, that being the  
3 cooperation agreement and the proffer statement and  
4 contained in the letter is an offer to do that again. So we  
5 have repeated actions of those documents being dispensed and  
6 an offer to do it again. It specifically shows that there  
7 is specific intent to obstruct either the continued  
8 cooperation or to alert individuals of the investigation or  
9 both. And however it is cut, it would be appropriate for  
10 the two-level adjustment.

11 THE COURT: Mr. Collyer, what's the status of the  
12 case against the co-defendants in Canada? There's specific  
13 reference to these documents being sent to individuals in  
14 Canada. What is the status of the case against them?

15 MR. COLLYER: There are individuals who have been  
16 indicted, who are wanted.

17 THE COURT: They're wanted, so have extradition  
18 proceedings been started, to your knowledge?

19 MR. COLLYER: Started, preliminarily, yes.

20 THE COURT: They have started?

21 MR. COLLYER: Yes, sir.

22 THE COURT: Okay. Thank you, Counsel.

23 Mr. Schlenker, on behalf of your client, go ahead, sir.

24 MR. SCHLENKER: Yes, thank you, Judge. Judge,  
25 first let me thank you for your considerations. I know that

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1 the sentencing in this matter has been delayed on at least  
2 two occasions, your Honor has been more than fair in  
3 resolving the issues of counsel, so I've stepped into the  
4 breach so to speak and I want to thank you on behalf of  
5 Mr. Peters.

6 THE COURT: I appreciate ya bein' here. Has been  
7 awhile and I'm glad, you know, we're finally at this point.  
8 It took awhile, but...

9 MR. SCHLENKER: Thank you, Judge. Judge,  
10 Mr. Peters is 43 years of age. His criminal history  
11 category speaks for itself, criminal history category II. I  
12 never thought that in practice before, whether it be federal  
13 or state, that I would be asking for a sentence of ten years  
14 before a judge. This is neither the place nor the time to  
15 make any statements regarding policy considerations. I've  
16 read other counsels' briefs in marijuana cases, they're  
17 arguing it shouldn't be a Schedule I controlled substance,  
18 it's legal in Colorado, Washington, a myriad of states.  
19 You're an Article III judge, you don't set policy and I well  
20 understand that and you're not gonna hear that in this case.  
21 But it is a marijuana case. Ten years for a 43-year-old man  
22 is a lot of time and we tend, by the numbers and by the  
23 Sentencing Guidelines, somewhat to diminish our sensitivity  
24 to the amount of time that is. My argument in the  
25 sentencing memorandum is essentially that you should

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1 sentence Mr. Peters to ten years, the statutory mandatory  
2 minimum, which, under the guideline level, given the effect  
3 of the most recent revision, would have placed that into the  
4 middle of the guideline, 108 to 135 months. That would be  
5 level 30. There -- in this respect, that's what the PSIR  
6 sets forth, a level 30, with exception of the enhancement  
7 that the Government now seeks. And I would argue that upon  
8 all of the facts of this case, upon all of the  
9 circumstances, the history, this is not an argument that  
10 Native Americans, people in that -- who have lived in that  
11 culture, born and raised, should get any special break, but  
12 we do give consideration due to socioeconomic background,  
13 history. And your Honor being in Syracuse, you have a lot  
14 of cases of Native Americans who come before you. It's  
15 tragic as to what has happened in this country. But ten  
16 years -- I don't know what "no greater than necessary,"  
17 3553(a), we are every day reading new cases, attempting to  
18 impart what that means in the context. Ten years is a lot  
19 of time, your Honor, speaking in the vernacular; more than  
20 that, I respectfully submit, would be greater than necessary  
21 upon the facts of this case.

22 He was not -- I've read some portions of the  
23 testimony in the case, I don't have a complete record. Your  
24 Honor sat through the trial, your Honor probably is in the  
25 best position, it was a relatively short, brief trial, four

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1 days. Your Honor, I'm certain, recalls the facts and  
2 circumstances of the case. Mr. Peters was not the prime  
3 mover in that conspiracy. I defer and make no comment as to  
4 the recitation of what the facts were or are. This case  
5 inevitably is going up on appeal. I respect the jury's  
6 verdict. I may not agree with it, Mr. Peters may not agree  
7 with it, but I respect the jury's verdict and I have no  
8 further comment to make with regard to the facts of this  
9 case.

10 I would like, I think -- the substance of my  
11 comments should be devoted to the 3C1.1 enhancement. I  
12 would like to point out first, as I've done -- and when I  
13 learned of this, and Mr. Peters learned of this, we  
14 cooperated with the Court, there was a consent to the  
15 protective order. There had never been a protective order  
16 in this case and never been anything filed under seal. As  
17 your Honor -- and as I discussed the issue with counsel, I  
18 was not the lawyer, we lawyers, and your Honor was -- as  
19 former U.S. Attorney and so forth, we provide our clients,  
20 because it's our ethical obligation, as the Second Circuit  
21 has told us, to provide our clients with information  
22 concerning the crimes to which they're being charged, and  
23 lawyers provide their clients in accordance with the rules  
24 of the particular facility or in accordance with their  
25 ethical considerations with documents that relate to the

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1 case. I would never provide a client a document where there  
2 was a protective order or it was under some form of seal.  
3 That gets worked out with the Court in providing information  
4 and I've been involved in several cases of that nature.

5 In this instance, the Government's own trial  
6 brief, which was provided, set forth -- we didn't mention  
7 his name, I don't mention the gentleman's name in the  
8 transcript, the co-defendant, if you will, or the  
9 cooperating witness, I'll refer to him as the cooperating  
10 witness, his name was set forth, his name is set forth in  
11 docket entries on PACER electronically filed. The  
12 Government, at no time, placed any of Mr. Peters' lawyers on  
13 notice at the time that this was information that should not  
14 be disseminated. And in regular course, Mr. Peters received  
15 this information and, in fact, talked to me about it. I  
16 might say Mr. Peters is wholly unaware of any case involving  
17 people in Canada. He thought his trial was the end of it,  
18 that this is the end of this case. Additionally, we have  
19 docket entries that recite the name of this individual. We  
20 also have the provision of discovery by the Government,  
21 which was not under seal or not under any restriction or  
22 protective order, that provided the proffer agreement, as  
23 well as the cooperation agreement, before, in advance of  
24 trial, and that was reviewed by my client. There's no way,  
25 Judge, when you focus upon the issues of intent, bad faith,

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1 mens rea, culpability, that one would assume that this was a  
2 document that was restricted. I would agree it's probably  
3 not wise, and we have discussed this, it's not wise to be  
4 communicating with people in other jails. Like going to a  
5 place where you shouldn't be, a lot of things can happen,  
6 and probably they're all bad. But he had no idea -- and the  
7 Government itself admits there's an inherent ambiguity. I  
8 sat down and I read that letter a hundred times because it  
9 really troubled me. I'm not sure what was intended here.  
10 And as you will note from my submission, I cited the Rule of  
11 Lenity, I don't often do that, and I looked at -- it's the  
12 statute -- we lawyers get it wrong. It's the statutory  
13 ambiguity as applied to the facts at hand, but it also  
14 implicates the ambiguity of the conduct that the law is  
15 trying to -- and we go back and forth. It's kind of a  
16 philosophical conundrum, if you will.

17           The Government, after the trial in January, and  
18 I'm not taking the Government to task here, but they issued  
19 a press release which was ostensibly picked up by The Malone  
20 Tribune, the local paper that is interested when people in  
21 the north country get arrested and charged, they cover it  
22 more fully even than the local papers here and possibly even  
23 in Syracuse. And they got all over this story, they -- and  
24 there was also a DEA, a specific -- there was a DOJ press  
25 release regarding Mr. Peters' conviction and there was a DEA

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1 press release concerning Mr. Peters' conviction, and the  
2 article recites -- and to understand the article, there's  
3 some ambiguity there, but they went into the court filings  
4 or the court records and they were able to obtain those  
5 records which Mr. Peters had and the name of this  
6 cooperating witness was clearly set forth in the public  
7 media through no fault of his. And if your Honor wished to  
8 engage in a hearing, which I don't think is necessary,  
9 because I'm making this representation in good faith as a  
10 proffer, he received a copy of the clipping from this inmate  
11 who he had resided with earlier on in Clinton County and he  
12 was now down in Rensselaer County as a result of the trial  
13 and conviction. So he then responds, and there's no denial  
14 of the letter.

15 But if ya look at 3C1.1, I think the Schuberger  
16 (phonetic) case, which is relied on, is distinguishable. In  
17 this case, you have to give the benefit of the doubt -- they  
18 say in terms of the inferences and so forth, the case law  
19 cites you give the benefit of the doubt to Mr. Peters.  
20 Mr. Peters told me when the motion for -- he didn't know  
21 about this motion for protective order that was filed, first  
22 thing he said was I didn't want to violate anything,  
23 here's -- I have the paperwork that he has, which I'm  
24 willing to give to the Government. He no longer has it, he  
25 had it, it was provided by former counsel.

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1           There's a big difference in sentence and that's  
2 why I guess I'm taking the time to discuss this in this  
3 fashion with you, your Honor, from a guideline sentence of  
4 108 to 135, and I'm asking to sentence him according to the  
5 mandatory minimum of ten years, 120, in the middle. We go  
6 up to 135 to 168, so that, potentially, given the facts and  
7 circumstances of the enhancement the Government asks for, he  
8 can receive virtually four years more as a sentence because  
9 of what happened with respect to this cooperating witness.  
10 And I think the word -- and I thank Mr. Collyer, he uses the  
11 word and concedes that there is ambiguity here. This is not  
12 a threat made against the cooperating witness directly. I  
13 don't construe it necessarily as a threat; I'm not sure what  
14 it means in terms of the language. Mr. Peters is not a PhD  
15 in English, doesn't teach English, and we would have to go  
16 through what was intended, no one knows, but the benefit of  
17 the doubt goes to him. It's kind of a tie, tie goes to the  
18 runner at first base. But I don't think it even gets close  
19 to that. There's no suggestion that this man ever attempted  
20 to contact the cooperating witness, sent anything directly.  
21 In fact, the clipping, as I pointed out, was sent by the  
22 inmate in Clinton down to him and then his letter attached  
23 that when he sent it back to the inmate for whatever reason.  
24           On this basis, your Honor, I think applying all  
25 the rules of equity, and consistent with case law, I would

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1 go back to my original submission to your Honor that  
2 Mr. Peters should be sentenced to the statutory minimum of  
3 ten years. That is more than enough for this case. Thank  
4 you.

5 THE COURT: Thank you, Mr. Schlenker. Mr. Peters,  
6 would you like to be heard, sir, before I impose sentence?

7 MR. SCHLENKER: Stand up.

8 THE DEFENDANT: No, I'm good.

9 THE COURT: Okay. You don't have anything you  
10 want to tell me today?

11 THE DEFENDANT: No.

12 THE COURT: Okay, sir. Thank you.

13 THE DEFENDANT: You're welcome.

14 THE COURT: All right. Well, there are a number  
15 of things that need to be addressed with regard to this  
16 sentencing before I sentence Mr. Peters. Initially,  
17 Mr. Schlenker, I'd like to address your argument with regard  
18 to the marijuana. It's quite clear, as you point out, as an  
19 Article III judge I don't make the law, I have a  
20 responsibility to enforce the laws that are before us and  
21 that are on the books. But I will say this to ya: It's  
22 quite clear from this defendant's history, regardless of  
23 what the commodity is, he was taking advantage of location,  
24 location, location and what was coming back and forth across  
25 that border. This case, to me, is about smuggling and it is

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1 regardless of what the commodity is, whether it's drugs or,  
2 as he did in the past, his history, guns, machine guns, and  
3 God knows what else he facilitated in coming back and forth  
4 through that Native American territory across that  
5 international border. It's quite clear from the proof in  
6 the trial that there were guns anticipated being smuggled  
7 during the pendency of the investigation that was going on  
8 into this drug conspiracy. So, it's Mr. Peters' continued  
9 activity that is of most concern to this Court. Despite  
10 being convicted and sentenced for the gun smuggling effort,  
11 he did a period of incarceration in federal custody, it did  
12 not deter him. He got out, he was on supervised release, he  
13 violated his supervised release, both in Canada and the  
14 United States, and his dual citizenship and access through  
15 the St. Lawrence River and that international border, he has  
16 been a principal cog in the wheel of illegal smuggling  
17 across the U.S./Canadian border for a number of years and  
18 certainly that needs to be addressed.

19 With regard to the requested obstruction of  
20 justice enhancement, the Court would note that I'm gonna  
21 credit the arguments made by the Government, but I would  
22 also like to make a record. The Court has an obligation to  
23 make these findings by a preponderance of the evidence. And  
24 while you can say there's ambiguity in the language of the  
25 letter that was sent by Mr. Peters, the Court has an

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1 obligation to look at the circumstances, the timing, the  
2 surroundings of what's going on at that time and the people  
3 that this letter was sent to. Now, Mr. Schlenker, you  
4 indicate that your client had no idea or has no idea that  
5 there may be a case pending against individuals in Canada.  
6 But certainly he was doing business with these individuals,  
7 he knows that they were involved in this conspiracy, he  
8 dealt with them, he took their money. He, you know, brought  
9 money back to them when drugs were delivered and payoffs  
10 were made. He, you know, facilitated this back and forth  
11 with these individuals in Canada, so there's no doubt that  
12 he knows that they were involved in criminal activity. And  
13 the fact that he sends this information to those individuals  
14 in Canada and notes that in the letter, that the individual,  
15 the cooperating witness, one of -- there were more than one,  
16 but this cooperating witness may be returning to Canada at  
17 some time and the reference that the friends in Canada may  
18 have some fun with that individual, the inference to the  
19 Court, given all the circumstances, is clear, certainly by a  
20 preponderance of the evidence, of what he's suggesting and  
21 what he's trying do.

22           The second thing I would indicate, the fact that  
23 it's sent to a jail where the cooperating witness is being  
24 housed, and the proffer agreement and everything else,  
25 regardless of what may have been public or not public,

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1 certainly all that information was not public or in the  
2 public venue of the media, so that fact, that it's sent to  
3 that -- another inmate in the jail where this cooperating  
4 witness is being held, when you take that into consideration  
5 once again, those facts fill in the blanks and when you  
6 remove that ambiguity that we're talking about and the  
7 language that he used, I want to make that clear for the  
8 record, the Court is prepared to impose sentence.

9           The Court has reviewed and considered all the  
10 pertinent information, including, but not limited to, the  
11 presentence investigation report, the addendum, submissions  
12 by counsel, and the Sentencing Guidelines manual, as well as  
13 the factors outlined in 18 USC Section 3553(a). The Court  
14 adopts the factual information and the guideline  
15 applications contained in the presentence investigation  
16 report. The original presentence investigation report sets  
17 forth a total offense level of 32, a criminal history  
18 category of II, and a guideline imprisonment range of 135 to  
19 168 months.

20           Based upon the changes to the Sentencing  
21 Guidelines regarding drug offenses, which went into effect  
22 on November 1, 2014, the offense is reduced by two levels.  
23 Therefore, as set forth in the revised presentence  
24 investigation report, the Court finds the total offense  
25 level is 30, the criminal history category is II and the

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1 guideline imprisonment range is 108 to 135 months. However,  
2 as the statutorily authorized minimum sentence of ten years  
3 is greater than the minimum of the guideline range, the  
4 guideline range becomes 120 to 135 months, pursuant to  
5 Section 5G1.1(c)(2) of the Sentencing Guidelines.

6 The Court has reviewed the submissions of counsel  
7 regarding the Government's motion for an upward adjustment  
8 for obstruction -- obstructing or impeding the  
9 administration of justice. Upon review of the evidence and  
10 the argument presented here, the Court grants the  
11 Government's motion and finds the two-level enhancement,  
12 pursuant to 3C1.1 of the Sentencing Guidelines, is  
13 appropriate and the Court makes this finding by a  
14 preponderance of the evidence and, again, in accordance with  
15 the submissions of both the Government and defense counsel.

16 The Court finds application note 4(a), which  
17 states threatening, intimidating or otherwise unlawfully  
18 influencing a co-defendant, witness or juror, directly or  
19 indirectly, or attempting to do so, applies to defendant's  
20 conduct in this case. Therefore, the Court finds the total  
21 offense level is 32, the criminal history category is II,  
22 and the guideline imprisonment range is 135 to 168 months.

23 Upon your trial conviction on Count I of the  
24 indictment, it is the judgment of the Court that you are  
25 hereby committed to the custody of the Bureau of Prisons for

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1 a period of 168 months. Based on the defendant's prior  
2 criminal history, his disregard for the laws of the United  
3 States and Canada, a high end sentence is imposed in this  
4 case. There is very little doubt in the Court's mind that  
5 this defendant has continuously participated in this  
6 criminal activity in the Native American Territory of  
7 Akwesasne, has used his position of owning real estate in a  
8 prime spot for smuggling to his criminal advantage for a  
9 number of years.

10           Upon your release from imprisonment, you shall be  
11 placed on supervised release for a term of six years. While  
12 on supervised release, you shall not commit another federal,  
13 state or local crime, you shall comply with the standard  
14 conditions that have been adopted by this Court, as well as  
15 the following special conditions, which the Court finds are  
16 necessary and justified in this case based on the nature of  
17 the instant offense, as well as the history and  
18 characteristics of this defendant as outlined in detail in  
19 the presentence investigation report:

20           First, you shall refrain from the use of alcohol  
21 and be subject to alcohol testing and treatment while under  
22 supervision. And the Court would note that while on  
23 supervised release from his first federal conviction for the  
24 machine gun smuggling across the border that this defendant  
25 had alcohol abuse problems and arrests in Canada while on

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1 supervised release.

2 Two, you shall participate in a program for  
3 substance abuse, which shall include testing for use of  
4 controlled substances, controlled substance analogues and  
5 alcohol. This may include outpatient treatment as  
6 recommended by the treatment provider based upon your risk  
7 and needs. You may also be required to participate in an  
8 inpatient treatment upon recommendation of the treatment  
9 provider and upon approval of the Court. The Probation  
10 Office shall approve the location, frequency and duration of  
11 outpatient treatment. You shall abide by the rules of any  
12 treatment program, which may include abstaining from the use  
13 of any alcohol. You shall contribute to the cost of any  
14 evaluation and/or treatment in an amount to be determined by  
15 the Probation Officer based on your ability to pay and the  
16 availability of third-party payments.

17 The Court directs that you shall reside in the  
18 Northern District of New York. The Court approves your  
19 travel to the Canadian side of the Akwesasne St. Regis  
20 Mohawk Native American Reservation for purposes of medical,  
21 educational or other treatment or government-related  
22 appointments or programs as approved by the United States  
23 Probation Office. And I emphasize, Mr. Peters, that any  
24 travel across that international border, whether it's within  
25 the Akwesasne St. Regis Mohawk American Reservation or not,

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1 needs to be approved by your Probation Officer. He will  
2 grant you approval to do that for certain specific reasons  
3 that I've listed -- medical, educational, other treatment if  
4 you're in some sort of rehabilitation treatment, or  
5 government-related deployments -- but there has to be a  
6 request and there has to be approval to do that.

7 You shall not commit another crime in the United  
8 States or elsewhere, including any criminal violation of the  
9 law of any province, state, county, town, city, village or  
10 subdivision of a country or of any recognized tribe.

11 The Court finds that based on your financial  
12 resources, projected earnings and other income, as well as  
13 your financial obligations, that you do not have the ability  
14 to pay a fine. Therefore, no fine is imposed.

15 You shall pay to the Clerk of the Court a special  
16 assessment of \$100, which is due and payable immediately.

17 The defendant shall consent to an entry of  
18 forfeiture to the items outlined in the preliminary order of  
19 forfeiture.

20 Both parties have a right to appeal this sentence,  
21 and you're advised to consult with your attorney to  
22 determine whether or not an appeal is warranted. Any appeal  
23 must be filed within 14 days of the date of the judgment  
24 being filed in this case. There is no waiver of appeal in  
25 this case.

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1           You are remanded to the custody of the United  
2 States Marshals in accordance with the terms of this  
3 sentence.

4           MR. SCHLENKER: I have one request, your Honor?

5           THE COURT: Yes, Mr. Schlenker, go ahead.

6           MR. SCHLENKER: To the extent that it has weight,  
7 Mr. Peters has a young child who lives in the north country.  
8 We have facilities, BOP facilities, in the State of New  
9 York, and, as I said, to the extent that it carries any  
10 weight, I would request that a judicial recommendation be  
11 made that Mr. Peters be incarcerated at a location which is  
12 as close as possible to home, subject, of course, to BOP  
13 requirements and rules and procedures.

14           THE COURT: As you're aware, Mr. Schlenker, I can  
15 make the recommendation, doesn't mean it'll be heeded.  
16 He'll be, you know, categorized and placed in a facility  
17 they find appropriate. They do, when they can, entertain  
18 judicial requests, and Mr. Peters, is that your request, you  
19 want to be as close as ya can to the north country?

20           THE DEFENDANT: Yes, sir. Raybrook would be nice,  
21 if it's possible.

22           THE COURT: Okay. Well, I'm gonna say this for  
23 the record: I think it's most important that you be placed  
24 in a facility with appropriate programs for alcohol, drug  
25 counseling, rehabilitation, and I want ya to be in the best

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1 program possible for that. I'll say that on the record.  
2 Secondly, if that coincides or they find that it's -- you  
3 know, the program is just as good at Raybrook as it is  
4 someplace else, I'm gonna request secondarily that you be  
5 placed in a facility as close as possible to your home so  
6 that you can have visitation from family and friends and  
7 certainly your son. So I'll put that on the record and make  
8 the request, but my first priority is treatment for you,  
9 sir, to make sure that when you do come out -- you're gonna  
10 be in for a period of time, I urge you learn a trade, they  
11 have all sorts of things, do something so that when you come  
12 out, you can step away from this world that you've been  
13 engulfed in up there on that border for a number of years  
14 and do something productive for your community. Maybe help  
15 do something for your son and his future, to show him, you  
16 know, that people can change and there's a different way to  
17 life. You can lead, certainly, in demonstrating that to  
18 him. There's a long history up there, I know you're aware  
19 of it, I'm aware of it, and I really do wish you the best to  
20 be able to step away from that, 'cause if you don't take  
21 advantage of some of these programs, I don't know what  
22 you're gonna do when you get out. So I hope ya take  
23 advantage of some of those programs, learn a trade, so when  
24 you come out, you can do something and give back to the  
25 community, do something worthwhile. I wish you the best of

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1 luck.

2 Anything further from the Government?

3 MR. COLLYER: No, sir, thank you.

4 THE COURT: All right.

5 MR. SCHLENKER: Thank you.

6 THE COURT: Mr. Schlenker, thank you.

7 (This matter adjourned at 11:36 AM.)

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*UNITED STATES DISTRICT COURT - NDNY*

## 1 CERTIFICATION OF OFFICIAL REPORTER

2  
3  
4 I, THERESA J. CASAL, RPR, CRR, CSR, Official  
5 Realtime Court Reporter, in and for the United States  
6 District Court for the Northern District of New York, do  
7 hereby certify that pursuant to Section 753, Title 28,  
8 United States Code, that the foregoing is a true and correct  
9 transcript of the stenographically reported proceedings held  
10 in the above-entitled matter and that the transcript page  
11 format is in conformance with the regulations of the  
12 Judicial Conference of the United States.

13  
14 Dated this 11th day of March, 2015.

15  
16 /s/ THERESA J. CASAL

17 THERESA J. CASAL, RPR, CRR, CSR

18 FEDERAL OFFICIAL COURT REPORTER  
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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**  
UNITED STATES OF AMERICA,

-against-

**NOTICE OF APPEAL**

**ALLAN PETERS,**

**8:13-CR-316-002(GTS)**

**Defendant.**

Notice is hereby given that Allan Peters, Defendant in the above-named case, hereby appeals to the United States Court of Appeals for the Second Circuit from the final Judgment entered in this action on February 13, 2015 and from that Final Order of Forfeiture entered in this action on February 17, 2015.

Dated: February 24, 2015

DENNIS B. SCHLENKER, ESQ.  
Attorney for Defendant



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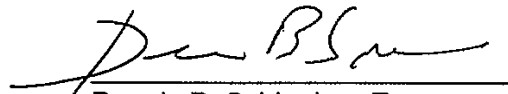
JA-816

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on February 24, 2015, a true and correct copy of the foregoing "Notice of Appeal" was filed electronically and a check in the amount of \$505.00 was mailed to the US District Court, Northern District of New York, 445 Broadway, Albany, NY 12207 as and for the filing fee for this Notice of Appeal. Notice of this filing will be sent to all parties of record by operation of this Court's electronic filing system.

Dated: February 24, 2015

A handwritten signature in black ink, appearing to read "Dennis B. Schlenker", is written over a horizontal line.

Dennis B. Schlenker, Esq.  
Attorney for Defendant  
Bar Roll No.: 102545